

DAMAGES FOR NON-PECUNIARY LOSS IN THE TORT OF
NEGLIGENCE: A RECONCEPTUALISATION

By

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Abstract

This thesis' core aim is to develop a coherent conceptual framework for non-pecuniary loss damages in the tort of negligence. This requires an analysis of existing theoretical frameworks, a redevelopment of the 'non-pecuniary loss' concept, and the development of a new basis for the assessment of damages awards. The thesis argues that it is a mistake to preconceive of damages awards as compensatory and analogue to pecuniary losses; the different nature of non-pecuniary losses gives rise to conceptual problems and tensions with practice where this is attempted. This thesis instead separates the identification of non-pecuniary losses from the aims and assessment of damages awards, arguing that the former must be analysed first and independently. A replacement 'personal loss' concept is developed, free from the deficiencies identified and centred on binary events which raise, for a notional observer, detrimental implications about the victim's personal interests. The thesis proposes that a damages assessment based on vindication, whereby awards serve as counterstatements to those detrimental implications, can then coherently engage that personal loss concept to produce damages awards. The resulting theory is uniquely capable of justifying and providing a defensible theoretical framework for recovery for non-financial losses.

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Introduction

In the words of Gaius: ‘...*cicatricium autem aut deformitatis nulla fit aestimatio, quia liberum corpus nullam recipit aestimationem.*’¹ Despite the obvious appeal of this prevalent intuition that it is not possible to value the body of a free person, doing so has long since become a daily occurrence in the system of non-pecuniary loss compensation in the tort of negligence in England and Wales. The aim of this thesis is to tackle this and numerous other difficulties and contradictions in this critical area of damages practice. It will be argued that a rebuilding of the theoretical structures behind the remedial process, beginning with a new understanding of the concept of a non-financial loss, will dissolve the difficulties and lead to practical improvements.

That the ultra-dominant approach to recovery for non-pecuniary losses is conceptually unsatisfying is not a novel argument, and this is not the first attempt to reform the area; as the early chapters of the thesis will make clear, there are a number of competing conceptualisations. Each of these will be dismissed, however, as failing to resolve fundamental problems or to account for key characteristics of non-financial detriments. Meanwhile, the result of criticism of the orthodoxy can often be an underappreciation of the normative importance of non-pecuniary losses and/or a suggestion that damages awards should not be made in this area. Non-pecuniary loss damages are sometimes only defended in terms of a pragmatic, sympathetic impulse: some response should be made; the best we can do is just award some money, even if this seems arbitrary. The importance of this new thesis, though, lies in a commitment to understanding non-pecuniary loss on its own terms, which in turn leads to a coherent theoretical structure; the thesis provides the

¹ Gaius (*ad edictum provinciale*) D.9.3.7: ‘...but no estimate is made of scars or disfigurement, as the body of a free man cannot be made the subject of any valuation.’ CH Monro (trans), *The Digest of Justinian* (CUP 1909).

basis for a solid defence of damages recovery for such losses against the onslaught of arguments as to conceptual inadequacy and arbitrariness. Unlike standard approaches, the thesis will give structured and coherent reasoning for the recognition of detriments as non-financial losses and the assessment of a damages award moving from and consistent with that loss foundation.

The problem of the nature of non-pecuniary losses and how to move from such a detriment to a monetary payment in response to it is not unique to the tort of negligence. The thesis is limited to this context because, firstly, of the limitations in time and length for the project and, secondly, the advantages negligence offers for the analysis. Negligence is general and not focused on any particular interest or form of interference.² It is also by far the most significant tort liability, with much of the important personal injury material litigated here. Meanwhile, the baseline understandings of compensatory non-pecuniary loss damages are relatively clear and stable and have been the subject of extensive litigation, such that the target for reanalysis is relatively well identified. Moreover, the absence of alternative damages regimes, particularly nominal and exemplary awards, allows for a clear and sustained focus on ‘compensatory damages’.³ At the same time, however, conceptual dissatisfaction is becoming more apparent, with some more recent attempts to expand recovery in negligence to new forms of loss.⁴ These serve well as a testing ground for theories about loss and damages in negligence. The arguments made in the thesis do, though, have further-reaching implications (indeed, in a limited number of places in the thesis some reference must be made to structural ideas in other torts to demonstrate the

² Unlike the more narrowly-focused trespassory torts or defamation, for example.

³ Whereas the relationship to such awards would need additional treatment if e.g. trespassory torts were included.

⁴ These include loss of reproductive autonomy (see e.g. *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309), loss of congenial employment (e.g. *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15), and a recent argument made for loss of autonomy in respect of healthcare information and choice (see *Shaw v Kovac* [2017] EWCA Civ 1028).

argument within negligence⁵) and it is hoped that the limited project here can provide a launching pad for a later, expanded analysis incorporating other contexts and damages regimes within a wider scheme. This is especially true of other personal and reputational torts, where non-financial interests have a central role.

The solution within that focused enquiry will present, in summary, as follows: So-called ‘non-pecuniary losses’ must be understood in accordance with their key characteristics (principally that the actual harms at root cannot be reduced to value or measured; that they relate to fundamental personal interests; that they are expressed through injuries and effects; and that they are not in themselves curable). Current identification methods for loss (naming effects of the wrong as seen through a comparison between a claimant’s actual and hypothetical alternative state post-tort) cannot be supported for this reason. Instead, a personal loss should be understood to lie in the occurrence of an event which (impliedly) raises a negative implication about a protected interest of the claimant, which implication is inconsistent with the extent of that interest. The extent of that inconsistency depends on the seriousness of the implied claim, which is determined by the event and its consequences for the claimant. A damages award can serve as a corrective for this insofar as it (impliedly) raises a counter-statement to the original implication; the seriousness of the statement made by given sums of money is matched to the parallel seriousness of the inconsistency raised by the detrimental event. In thus dispelling a shadow cast over the claimant’s interest (prospectively), the assessment and award are vindicatory (and not compensatory). This approach will be seen to have numerous practical advantages and to provide a sound conceptual basis for understanding and developing the remedy.

⁵ In particular, for example, a concept of normative damage outlined by Varuhas primarily by reference to torts actionable per se must be considered in chapters 3.III.1 and 5.III.

The work towards that proposal begins in chapter one with an overview of the dominant, orthodox approach to damages for non-pecuniary loss in negligence and its key commitments. This provides the foundation for the critique to follow and will identify the basis on which detriments are identified as losses, and how a monetary sum as damages is assessed and awarded in response. It will show that orthodoxy relies foremost on the concept of compensation as value replacement, with loss thus defined as a value change produced by the tortious wrong, identified by comparing the state in which the claimant finds herself post-tort with her hypothetical state but for the tort. The aim of damages will be seen to be the replacement of that lost value, judged by conventional, reasonable-sum figures accepted as representing the values of the detriments. Above all, it will be seen that there is minimal loss thinking throughout, with conceptual tensions and contradictions arising and the focus lying instead on damages quantification based on past practice and judicial discretion.

Chapter two will go on to interrogate further the understandings outlined in chapter one in order to demonstrate clearly a number of critical difficulties in the conceptual underpinnings of that system. These render continued use of the framework unsupportable given the deleterious effects the difficulties give rise to. In particular, it will be shown that there is an underappreciation of the normative importance of non-pecuniary losses resulting from a focus on quantification based on a compensatory function that cannot be served for non-pecuniary losses. The primacy of compensation, and associated need to engage with loss only as a value idea based on comparison between two states, will be seen to be fundamentally at odds with a coherent representation of such losses' characteristics. Meanwhile, the lack of further definitional clarity will be seen to lead to excessive discretion and arbitrariness in the presentation of losses suffered by a claimant, with important normative decisions buried in the quantification of damages. Finally, it will also

be shown that the available alternative conceptions, particularly accounts based on loss of happiness, do not resolve these problems.

Once these chapters have broken down the dominant theory behind non-pecuniary loss damages, it will be possible to begin rebuilding a concept of loss, and then damages assessment, which is more coherent. Chapters three and four focus on the idea of loss. Chapters five and six move on to consider damages assessment based on and as a response to that loss concept.

Chapter three begins the foundational work necessary to produce a new loss concept termed ‘personal loss’. It will be argued that an abandonment of the prior commitment to compensation and to a value understanding leads to a very different concept more in tune with fundamental intuitions about non-financial detriments. This concept centres on the idea of detrimental events, setting in place a two-part loss idea: the occurrence of an event, which raises a detrimental implication. Chapter three will discuss the definition of relevant ‘events’ in terms of their raising an implication about the victim’s personal interests inconsistent with the reality of those interests, as viewed from the perspective of a notional observer. A demonstration of how current recoveries can be integrated into this new framework will then follow, serving equally to explain the benefits the analysis brings in structuring, rationalising and reconciling available awards; the framework will be seen to have profound advantages in understanding the categories of personal losses for future development of the law.

Chapter four will add more detail to the framework for personal loss events established in chapter three by focusing on a number of particular areas where an appropriate and intuitively acceptable labelling and division of loss events requires more elaboration. This relates to the account given to the duration of personal injuries and their severity, the phenomenon of a tortious wrong making a pre-existing condition worse, and the exceptional harm of death. In each case, the analysis will show that these important

circumstances relevant to the quality of events can be incorporated appropriately into the personal loss analysis through a careful consideration of how any given loss event is defined and the boundary line to the extent of the detriment (the detrimental implication raised by the event).⁶

Chapter five will take this new loss concept as a foundation as it moves on to the question of how a monetary, damages response to loss can be produced. The analysis will focus to this end on the second ‘prong’ of personal loss: the non-binary detriment in the inconsistency between the implications raised by the defendant and the claimant’s personal interests. The first and most pivotal question will be the choice of a relevant assessment operator for moving from this loss idea to a relevant damages response. The chapter will argue that vindication must be chosen based on the proposed understanding of that term given by Varuhas, which stresses a particular function of features of the law in maintaining and affirming the importance of personal interests within a hierarchy. Through analysis of Varuhas’ proposal (and comparison also to Robert Stevens’ substitutive damages thesis), it will be argued that this vindication function can engage the concept of personal loss (as detrimental events) developed in this thesis. Vindication will be seen to occur as a counterstatement (made through a damages award) of the negative implication raised by a personal loss. The two ‘prongs’ of the loss concept will thus be shown to allow for an identification of loss not focused on being ‘factually worse off’ (rather a binary event, allowing a vindictory response), and yet for this response to factor in the clear relevance of ‘factual consequences’ (in determining the detrimental implication to be counterstated).

A number of other, prominent functional operators competing for recognition in the assessment of personal losses will be analysed in the same chapter, and will be found to be inadequate in comparison to vindication. This inadequacy will be seen to relate both to their inability to engage personal loss events in the qualitative, value-less form proposed

⁶ The latter point being developed in chapter 6.

and to their inability to explain assessment factors consistently deemed to be relevant by the courts. Compensation, solace, punishment and satisfaction will be shown to offer no advantage over vindication and to be ill-suited to the task at hand. The break with compensation and pecuniary understanding imposed at the beginning of chapter three (in order that non-financial loss might be understood on its own terms) is thereby rendered complete – once loss is independently analysed and understood, it will become clear that compensation simply does not fit.

Finally, chapter six will turn to address the practice of assessing and awarding damages for personal losses by reference to the vindictory aim selected in chapter five. There it will be demonstrated that a vindication for personal loss concept as proposed can provide a coherent progression through to, and explanation and structure for, the assessment of a damages sum. It will be seen that elements of the assessment process which seem to shift the focus away from the claimant to the defendant or broader social concerns are explicable through the parallel accounting of the seriousness of an implied statement (raised by a detrimental event) and counterstatement (raised by an award). It is equally this parallel between statements which will allow for a justifiable progression from value-less loss to valuable monetary award, impossible on orthodox analyses which instead attempt to impose value on loss itself. The various factors relevant to establishing the seriousness of the loss and of the award will be seen to replicate generally our current intuitions, but with some conceptually important reforms, including in the relevance of interest on damages and the level of appellate oversight. This will complete the analysis.

Before now moving on to the substantive chapters, a number of final terminological clarifications must be made. These concern the use here of the terms ‘general damages’, ‘damages for non-pecuniary loss’ and ‘personal injury damages’. Each of those appears in this thesis as a subset of the preceding term and unless specified all are referred to only in respect of the tort of negligence. ‘General damages’ (as contrasted with ‘special damages’)

are those portions of a damages award requiring imprecise assessment– i.e. non-pecuniary loss damages and future pecuniary loss.⁷ Non-pecuniary loss damages in the sense used here means what are generally referred to as compensatory damages for non-financial detriments (the precise meaning is the prime subject of these first two chapters) and is the focus of the thesis.⁸ Personal injury damages, as it will be used in this thesis, refers to damages for non-pecuniary loss arising from personal injury. ‘Injury’ itself, meanwhile, will only refer to personal injury, not to *iniuria* or ‘wrong’, in order to maintain a clear distinction between the ideas of wrong (liability) and loss and damages (remedy). In that same vein, ‘damage’ will be used to refer to the requirement that actionable damage be suffered (along with and as a result of a breach of a duty of care) in order to establish a *liability* in negligence. This is treated as distinct from ‘loss’, which refers to the ‘bad’ attendant on that wrong and for which a *remedy* is to be provided. The distinction is discussed at length in chapter three.⁹ Finally, harm and detriment will not be used in any technical sense; they will be used to refer to intuitively bad things suffered by a claimant (the terms thus transcend ‘damage’, ‘loss’ or ‘injury’).

⁷ On this sense of general damages generally, see e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 3-003 f. One of the conclusions of the thesis will ultimately be that the category should in any event be scrapped – see chapter 6.III.

⁸ Again, however, it will be argued that the term should be abandoned ultimately; cf. chapter 3.I.

⁹ See chapter 3.III.

Chapter 1 – Damages for Non-Pecuniary Loss

I. Introduction

The law relating to the assessment of damages for personal injury, the pivotal playground of non-pecuniary loss ideas, can be said to be very young – for Ibbetson and for Burrows, for example, it only becomes possible in the middle of the twentieth century to speak of English law properly having developed such a body of law and theorised it.¹ Certain principles for non-pecuniary loss damages are now, however, ultra-dominant, despite presenting enormous conceptual difficulties. The aim of this chapter will be to outline the current, basic framework in negligence for both the identification of a non-pecuniary loss and the assessment of a damages award for the same. The principles underlying those processes will be drawn out, as well as a number of conceptual problems inherent in them. The following chapter will go on to interrogate further the difficulties which arise as a result.²

The conventional approach to damages in the case of non-pecuniary losses in negligence is what has been termed the diminution in value approach,³ which focuses on the compensation of a difference made to a claimant's value position by the defendant's tortious wrong (understood as an exercise in value replacement). This conventional understanding is fleshed out in detail below, along with the practice for the assessment and award of a fair and reasonable damages sum which completes it. Alongside this, there will be some discussion of alternative understandings which achieve greater or lesser degrees of support in the literature and this will then likewise be expanded in chapter two. Later chapters will, as suggested, interrogate and revise these foundational ideas,

¹ See David Ibbetson, 'Tortious Damages at Common Law' in Gamauf, R (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Manz Verlag 2017), 107; Andrew Burrows, 'Damages and Rights' in Nolan, D and Robertson, A (eds), *Rights and Private Law* (Hart 2012), 276.

² See chapter 2.

³ See e.g. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.4; Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 105; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-069.

beyond the difficulties and controversies which already emerge from the basic outline, and consider the extent to which they produce a coherent and conceptually sound framework for the remedy.⁴

The area of damages for non-pecuniary losses is a relatively stable one in negligence currently. Whilst other torts enjoy potentially radical developments in their damages practice (consider, for example, the recent Court of Appeal decision in *Gulati v Mirror Group Newspapers*⁵ in respect of the misuse of private information), in negligence there has been little change at a foundational level for many years. At least since the courts adopted their current line on unconscious claimants (a recurring issue below and in several later chapters⁶), there has been no real challenge to the understanding of the compensation of non-pecuniary loss in practice.⁷ Discussions of the potential for theoretical development in the damages field have instead tended to focus on the creation of a vindictory damages concept⁸ and this overwhelmingly outside of negligence, or else on restitutionary awards⁹ and the broader, abstract conceptualisation of damages remedies.¹⁰ None of these ideas has altered the dominance of the compensation for value loss theory in negligence. In terms of non-pecuniary loss damages in negligence themselves, though, there are some recent novelties in practice, as well as a number of important and steadfast heterodoxies in the literature, but these have not led to any significant departure from the dominant principles to be outlined below.¹¹

It will be the argument of these first two chapters that conceptual change is necessary nevertheless; the nature of the change proposed will have extensive implications for recovery in

⁴ In particular, chapter 2.II.4 will address the conceptually sceptical but pragmatic attitude taken to the orthodoxy seen here, and 2.IV will address existing alternatives in more depth.

⁵ [2015] EWCA Civ 1291; [2017] QB 149.

⁶ See below, III.2; IV.1.b.iii and especially chapter 3.II.3.b.

⁷ In its report on non-pecuniary loss (including beyond negligence) as part of a general project on damages, ultimately the Law Commission advocated for no change in the core concepts – see Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.1-2.68.

⁸ On which see e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 1-009 and chapter 16; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-035.

⁹ On which see e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 1-009 and chapter 14; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-030 ff; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 375 ff.

¹⁰ See e.g. Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 701 ff for an example of discussion of an ‘expansionist thesis’ that damages is a unitary idea incorporating many forms traditionally defined primarily by their respective purposes.

¹¹ See below, III.2-3, and chapter 2.IV.

negligence. As will become clear below, and then most particularly in the extensive further criticism of the dominant theoretical approach to damages levelled in chapter two, the orthodoxy leaves a great deal to be desired conceptually and has failed to put alternative approaches or even existential threats to its position satisfactorily to bed. Particularly since more attention turned in the later twentieth century to ideas about effective and efficient compensation and economic analyses, there have been persistent and serious calls for the reduction or even abolition of such damages awards in light of a perceived failure to stand up to conceptual scrutiny or achieve their stated aims.¹² This is, though, intuitively problematic – the longstanding and unapologetic practice of the courts in making awards recalls a deep-seated sense that recovery in such instances is important. The only solution to that tension is thus to confront the notion of non-pecuniary loss afresh and achieve conceptual improvements acceptable to practice and, especially, sufficient to fend off these attacks. This begins with a clear portrayal and evaluation of the current concept.

II. Basic commitments

1. Compensation

The foundational commitment of the orthodox approach to non-pecuniary loss recovery in negligence is to the principle of compensation (as a remedy born of and inherently well connected to corrective justice¹³).¹⁴ Damages are thus understood to entail replacement with money of value lost as a result of the wrongful conduct which grounded liability in the tort (albeit that the value

¹² To the extent that abolition was one of the core questions considered by the Law Commission in its report – Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.1 ff. Examples of (relatively recent) attacks in the literature include e.g. Bruce Chapman, ‘Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice’ in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995) and Richard Lewis, ‘Increasing the Price of Pain: Damages, The Law Commission and *Heil v Rankin*’ (2001) 64 MLR 100.

¹³ See e.g. Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 713.

¹⁴ See generally *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25, *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 and *The Mediana* [1900] AC 113. See also generally Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001.

here cannot objectively be measured in money).¹⁵ The centrality of its place is often very explicitly discussed¹⁶ and in terms of assessment is demonstrated by the tendency to describe ‘compensation’ variously as an *objective* of a damages award and as a *measure* of damages:¹⁷ it is seen by many as both the aim guiding damages assessment and as the mechanism of assessment. The aim is identical to that seen with financial loss where, though, the idea is more intuitive insofar as a monetary loss is replaced with equivalent money.¹⁸ The primacy of financial loss in this respect is clear not only from the terminology (‘non-pecuniary’ is negative and residual), but from the fact that often pecuniary loss is discussed by commentators in advance of non-pecuniary loss and explanation of the latter then refers back.¹⁹ Non-pecuniary loss recovery’s place as a ‘subordinate’ of pecuniary loss in this sense on the orthodox analysis also finds expression in reassurances that ‘as with other losses’ the compensatory principle applies²⁰ and it is sometimes rendered explicit that compensation here is a secondary form.²¹ The implied remedial understanding for the tort of negligence thus places the (relatively) straightforward notion of pecuniary, financial loss centre-stage and carries that framework over into the (difficult) case of non-pecuniary losses. Non-pecuniary loss damages are committed to compensation following a clear if imperfect analogy to pecuniary loss recovery.

¹⁵ See e.g. *ibid*, para 2-001 f; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 29 f; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-069.

¹⁶ See Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-002 defending Lord Blackburn’s classic articulation in *Livingstone* as the starting point for any damages exercise against an apparently contradictory dictum of Lord Hoffmann in *Banque Bruxelles Lambert v Eagle Star Insurance* [1997] AC 191 (at 211), citing support *inter alia* from Jackson LJ in *Grange v Quinn* [2013] EWCA Civ 24; [2013] 1 P & CR 18 (at [76]).

¹⁷ Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 702 f.

¹⁸ See David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), paras 3.1ff.

¹⁹ See e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), where part two covers pecuniary loss before non-pecuniary (chapters 3 and 4) and in chapter 38 (personal injury) non-pecuniary loss does not feature until section VI. Cf. also the structure of Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000), chapter 9; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), chapters 3, 4; Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), paras 2.15 ff, 2.19 ff.

²⁰ David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), para 3.1 (emphasis added). Cf. e.g. Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), para 2.23.

²¹ See e.g. Richard Lewis, ‘Increasing the Price of Pain: Damages, The Law Commission and *Heil v Rankin*’ (2001) 64 MLR 100, 110 f (reproducing Atiyah). Contrast, though, e.g. Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000), para 9-068: ‘essential losses’ which are unwaveringly awarded.

2. Loss

The question which then *follows* this is what ‘loss’ itself (to be compensated) means. Non-pecuniary loss thus plays second fiddle to the compensation paradigm – so much should be clear from the foregoing, and equally might be seen in the ambiguity over loss which is tolerated. McGregor, for example, late author of the most prominent practitioners’ work on the law of damages, describes the object of an award as giving compensation for damage, loss or injury (and notes the interchangeable use of those terms).²² Such expositions sometimes display dissatisfaction with the conceptual position, but still commit first and clearly to compensation, skirting the loss issue.²³ Much less precision and exactitude is demanded in terms of expressing and understanding what is subject to remedy as opposed to what the remedy is supposed to achieve. For McGregor, it is clear at least that the ‘basic criterion’ for determining an award is what a claimant has lost, as opposed to what a defendant should pay in the pursuit of a general aim of compensation.²⁴ What is lost he describes as relating to ‘interests not immediately connected with monetary considerations’.²⁵ Again, the description focuses around the compensation issue of how loss relates to money, not an independent definition of loss. Loss is essentially whatever compensation compensates; whatever lost value is assigned by the court in relation to the difference made to the claimant’s life by the tort.

Another, much more explicit definition of loss (a rarer approach) which is enlightening here is that given by Cane, which relies on a form of archetype.²⁶ Cane defines a core, central sense of loss and then extends out from that into a broadening range of detriments. This ‘most centra[l]’ aspect is ‘things which [the claimant] had before the tort occurred but which [the claimant] does not have

²² Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001 and n 1 there. See also David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), paras 3.1 ff.

²³ See e.g. *ibid.*

²⁴ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001 and n 2 there.

²⁵ *Ibid* at para 5-002. Cf. also e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-20: ‘Pecuniary loss is that which is susceptible of direct translation into money terms...while non-pecuniary loss includes such immeasurable elements as...’; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 4.01 (not directly computable). The ‘indirect’ connection is discussed immediately below in this section and IV.1. Some outlines replace directness with completeness; see e.g. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 5.12: ‘cannot be fully quantified in monetary terms’.

²⁶ Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 103 f.

now'. Cane's central case apparently includes e.g. limbs, freedom, and the like. This is a comparative, state-based account;²⁷ that is to say one which identifies loss by comparing the claimant's position in two states.²⁸ These states are here separated temporally – we compare the current state (at the point of assessment at trial²⁹) with the past, pre-tort state and if the current state is worse (in value terms), we have loss. Cane's definition, as it broadens, comes to include past and then future gains not made, past and then future expenses, and finally 'harm' and 'damage' suffered, with each category '[involving] a greater or lesser departure from the central meaning of "loss"'.³⁰ Departing from the very core, then, Cane shifts from temporal state-comparison to other modes of loss identification. A gain not made requires comparison between the claimant's current state and the hypothetical state in which the claimant would have been but for the tort (counterfactual state-comparison). 'Harm' and 'damage' are not defined further, but differ in some way from the previous categories, falling right at the outer edges of the concept. Nevertheless, the non-pecuniary losses involved in these various gradations of departure from the centre are said not to be treated differently, but only as natural parts or extensions, with the whole swept under a unifying idea of 'made worse off (in some sense)'.³¹ Ultimately the position is more clearly expressed but differs little from McGregor's value compensation framework.

The temporal focus of Cane's core does, however, stand somewhat in conflict with the more common commitment to counterfactual comparison to be found in orthodox analyses (comparing the current state with the hypothetical state had there been no tort) and case law.³² It can, however, probably be taken as implied that if the claimant had the thing before the tort, she would have continued to have it but for the tort such that there is a large deal of crossover between the ideas. In any event a comparative, state-based method is clearly used on all of the standard accounts.

²⁷ Cf. chapter 2.II.1, 3.II.1.

²⁸ See e.g. Victor Tadros, 'What Might Have Been' in Oberdiek, J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014), 172 explicating three ideas for 'harm', 2 comparative, 1 non-comparative and all state-based; Matthew Hanser, 'The Metaphysics of Harm' (2008) 77 *Philosophy and Phenomenological Research* 421, extensively criticising comparative state analysis (albeit again in the context of 'harm').

²⁹ Cf. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38-036 ff; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 184 f.

³⁰ Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 104.

³¹ Ibid. Cf. Stevens' 'factually worse off' – Robert Stevens, *Torts and Rights* (OUP 2007), 59, 78 (with no clearer defined sense).

³² See especially the seminal *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25. Cf. e.g. Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 269; Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38-036 ff.

Essentially, this must in fact follow on any predetermination of compensation (as value replacement) as the aim: in order to replace value, there must be missing value, which implies a value differential, requiring a comparison of value positions. The claimant's current (i.e. post-tort) value position is compared with another (either the pre-tort past or hypothetical but-for-the-tort present). Insofar as there is any difference between the two values, there is seen to be loss to this extent. The diminution in value approach is thus committed to identifying loss by comparison of the claimant's state in two situations.

3. Fair and reasonable sum

The monetary award to be made is then determined by an attempt to find an equal value to the loss so identified. The corrective thrust and appeal of replacing lost value with equal value is clear. There is, it should be noted, understandably no attempt made to isolate the damages and loss ideas at the level of value: there is no need for two assessments where the sum in loss and sum in damages are to be equal. As the value of non-pecuniary loss cannot³³ (or, as often said, cannot 'precisely'³⁴) be 'calculated', only qualitatively described, a so-called fair and reasonable sum to be paid in damages is simply produced by the assessor.³⁵ This is the third foundational commitment to be highlighted; to assessment by estimation of a fair and reasonable award.

In the recent case of *Sadler v Filipiak*, we can see a demonstration of these ideas; Pitchford LJ, in noting the issues raised in the case, describes the first as relating to when the court may interfere with the assessment of damages, 'particularly where there is no challenge to the judgment...of the injuries themselves and of the effect of those injuries.'³⁶ The disagreement turns only on the sum

³³ E.g. *ibid* at para 2-001; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 4.01; CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-92.

³⁴ E.g. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 5.12; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), paras 23-070, 23-072; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-54; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 271.

³⁵ See e.g. *Wells v Wells* [1999] 1 AC 345, 389 f (Lord Hope): the sum is an estimate based on a broad idea of reasonableness and previous awards. On the latter aspect, see below, IV.1.a.1. Cf. also e.g. Peter Cane (ed), *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1.

³⁶ *Sadler v Filipiak* [2011] EWCA Civ 1728 [28].

itself, which is disconnected to that extent from the injuries and effects³⁷ which describe loss. This suggests that, whilst changes in the value are usually tied to arguments over the injuries and their effects, the sum can be altered without amending the understanding of them. Thus in practice the award is (it must be) created as a fair and reasonable sum *following* a first identification of injuries/effects (only qualitatively described). Though the theory plunges us straight into a question of lost value, in reality ‘loss’ must be described without reference to value and then, *ab ovo*, an award is created. The answer given to the question when a court may interfere (only where the sum is wholly erroneous or based on a wrong principle of law or misapprehended facts) recalls, in part, that the sum is an estimate based on a broad discretion in reasonableness and fairness.³⁸

In summary then, the relatively simple, core tenets of the diminution in value approach are these: non-pecuniary loss damages are compensatory (value-replacing) and they represent a fair and reasonable award in light of a difference made to the claimant’s position as compared with a (counterfactual) alternative.

III. Injuries and effects

1. A general focus on effects

Returning to the idea of the claimant’s value positions (differentials in which form the basis of [value] loss to be subject to a compensatory response), it is time to consider more closely how those positions (and thus the differences between them) are understood and described. The first port of call is the rough consensus in theory that we are to look for and compensate the effects of injuries, rather than, or perhaps in conjunction, with injuries *per se*. Compensation is not (so much) given, that is, for injuries *ipse* and the direct changes in the claimant (e.g. the loss of a hand) but for the consequences those produce (e.g. no longer being able to play the piano as a hobby for the lack

³⁷ On which see below, III.

³⁸ On appellate intervention and these criteria, see further below, IV.

of the hand; pain suffered in losing it).³⁹ The exact boundary line here is somewhat controversial and imprecisely settled, however, with a number of variations in the presentation of the point – some authors suggest that effects merely ‘predominate’⁴⁰ in establishing what loss exists in a given case, others that effects alone are relevant.⁴¹ The latter solution would seem problematic insofar as it would be surprising for injuries to be irrelevant, rather than merely less significant in the mind of the claimant, but Ogus in particular has provided a popular and blistering critique of the tendency to confuse the ideas,⁴² identifying a focus on injuries as standard practice but maintaining as a matter of theory that it is conceptually unsound to import value to bodily integrity itself, rather than bodily use or function.⁴³ (Ogus himself, it should be said, prefers a ‘functional’ standard; providing money calculated to cover the costs of alternative activities/facilities to provide happiness equal to a level of happiness considered lost).⁴⁴

The reliance on injuries Ogus noted in practice seems to continue to hold true to a reasonable extent; there is an apparent tendency to discuss the matter overwhelmingly in terms of injuries – the recent *Sadler* case demonstrates that the importance (at least as far as the value compensation theory outlined above is concerned) of effects needs to be stressed in order to achieve the place in practice accorded it in theory, the trial judge remarking: ‘Mr Lazarus reminded me, I think rightly, that the award of damages is not strictly for the injuries, but for the pain and suffering and loss of amenities which result from them.’⁴⁵ In the same case, Pitchford LJ himself spoke of both injuries and effects and Etherton LJ only of injuries. Presumably in the latter instance injury is being used as a shorthand (though whether for ‘effects of injuries’ or for ‘injuries and their effects’ is unclear), but in any event it is apparent that the idea of injury is very significant in practice (so much so that the court needs reminding of the theory’s focus on effects) and also serves a channelling function

³⁹ E.g. W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-065.

⁴⁰ See e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-56 – effects of injury (merely) predominate to the extent that a distinction is even made; cf. CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5.93. Patrick Atiyah seems to focus solely on ‘injury’, however that is understood; see *The Damages Lottery* (Hart 1997).

⁴¹ E.g. Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), para 2.23 (relying on a somewhat out-of-context dictum of Lord Reid).

⁴² A Ogus, ‘Damages for Lost Amenities: for a Foot, a Feeling or a function?’ (1972) 35 MLR 1, 6 ff, 11.

⁴³ *Ibid.*, 10.

⁴⁴ An approach which clearly departs from current practice and is thus discussed in chapter 2.IV.2-3.

⁴⁵ *Sadler v Filipiak* [2011] EWCA Civ 1728 [15] (Pitchford LJ, recounting [60] in the trial judgment).

for understanding the loss involved. The prime example of this lies in the fact that navigation of current damages practice (in respect of personal injuries at least, of course the major part of non-pecuniary loss), and a significant aspect of the assessment process in the cases themselves, now often turns on the Judicial College's 'Guidelines for the Assessment of General Damages in Personal Injury Cases',⁴⁶ a descriptive table aiming to organise and present in a navigable structure the ranges of awards made for given personal injuries. As should be clear already from that brief description, this is organised in the first instance around the medical injuries involved, with each associated with a rough bracket range of awards.

The balance of injuries and effects has been raised again very recently in the context of deeper-seated controversies which deserve to be mentioned here already. With, for example, the rise of rights-based theories of tort (or private law more generally) in recent years, the prospect has arisen of rights infringements simpliciter featuring as compensable loss ideas. Stevens, to give one specific example, contemplates the idea that in some situations damages are calculated to value the extent to which a claimant is factually worse off following a wrong (as a proxy for valuing the right so infringed;⁴⁷ the idea has the potential to include both injuries and effects in uncertain combination) and in other situations they are calculated to value the right infringed directly (regardless of and without reference to injuries or effects).⁴⁸ Beyond that, other perspectives likewise further muddy the already turbulent waters here – for Descheemaeker, for example, the courts have been insufficiently discriminating in identifying injuries and effects insofar as they have mixed what he calls the internal and external approaches. In part and in inconsistent ways, he argues, the courts have focused on both physical, objective interest interferences as compensable losses (such as infringements of physical integrity, reputation etc.) and subjective emotional responses to the same (mental distress etc.) despite these representing mirror images of the same harm for that author.⁴⁹ (Descheemaeker's solution, rejecting 'internal' approach-losses, would

⁴⁶ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), on which see below, IV.1., IV.1.a.

⁴⁷ Or at least the value of the extent of the right subject to the infringement – see e.g. Descheemaeker taking issue with the point: Eric Descheemaeker, 'Unravelling harms in tort law' (2016) 132 LQR 595, 602.

⁴⁸ Robert Stevens, *Torts and Rights* (OUP 2007), 59 ff.

⁴⁹ Eric Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 84 ff.

seem to place more emphasis on injuries than orthodox analysis and eradicate recovery for a vast swathe of currently recognised emotional effects;⁵⁰ it is discussed in more detail in the chapters to follow⁵¹).

In short, the relevance of the ideas of ‘injury’ and ‘effect’ has been and remains controversial. The effects of injury certainly have a solid place in the loss enquiry, but there appears to be great practical importance in the notion of injury as well. No clear solution has yet presented itself.

2. Happiness and subjectivity

One of the most prominent alternatives to the ultra-dominant concept of loss presents all losses as a particular kind of effect on the claimant – a loss of happiness. Here all non-financial detriment is understood, that is, in terms of a resultant hedonic impact on the victim; the polar opposite, it might be noted, of Descheemaeker’s approach just described. The approach continues to be well enough represented in the literature that it must also be mentioned at this stage (though more extensive discussion will again be left over until later⁵²). Adherence to one of various forms of the concept is still relatively prevalent and prominent proponents include Burrows.⁵³ This is despite (and in opposition to) the fact that courts award damages where there clearly cannot be any actual unhappiness because, for example, the claimant is unconscious⁵⁴ (and even the Law Commission has ultimately abandoned any notion of reforming the law on a happiness basis⁵⁵).

However, this also brings us to the distinction, now established as a counter position to a hedonic approach, in the orthodox analysis between pain and suffering and loss of amenity forms of non-pecuniary loss, understood as a distinction between ‘subjective’ and ‘objective’ elements of

⁵⁰ Ibid, at 90 ff.

⁵¹ See especially chapter 3.II.3.

⁵² See chapter 2.IV.2-3.

⁵³ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 31; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-56.

⁵⁴ This and other difficulties are discussed further in the analysis in chapter 2.IV.2-3.

⁵⁵ Cf. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.8-2.24.

recovery.⁵⁶ Since a flurry of cases in the latter half of the twentieth century dealing with exactly the unconscious claimant situation,⁵⁷ there has been a well-established (though not uncontroversial) understanding that non-pecuniary losses can be divided into these objective and subjective elements. ‘Objective’ amenity loss can be suffered by and lead to recovery for any claimant, regardless of her state of awareness at any point in the chronology (whether at the time of its infliction, at the time of claim, or any other time in between). ‘Subjective’ pain and suffering, by contrast, turns on a question of awareness and is only available where the claimant can actually be said to have (had) some subjective experience of the pain or suffering alleged. A claimant immediately rendered comatose in an accident, for example, will not recover for pain or suffering attendant on her injuries unless and until she wakes from the coma and actually begins to have pain and suffering experiences. Pain and suffering has even come to be seen in some quarters as a term of art expressing subjective loss experience in a very general way, without differentiating different notions of pain, distress etc.⁵⁸ There is, though, judicial recognition that there are different ideas, each with different impacts, with independent references made to e.g. ‘pain’, ‘suffering’, ‘distress’ and ‘anxiety’.⁵⁹ However, this subjective/objective distinction does not meet with uniform approval, with various authors displeased with the development, because, for instance, they understand all non-pecuniary loss itself as subjective or they understand the (fundamental⁶⁰) compensation idea as implying that the remedy can only be effected subjectively.⁶¹ The former idea puts the horse before the cart (consistent, authoritative recognition by the courts means we do have non-subjective loss and we must rationalise it); the latter demonstrates again that commentators see compensation as paramount and work backward to loss from what a remedy for loss can apparently achieve. These errors will feature in later chapters.

⁵⁶ See Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38-252 ff on the heads and, especially, para 38-256 f lamenting the objective/subjective divide. Cf. Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 272 f.

⁵⁷ Including, inter alia, *Wise v Kaye* [1962] 1 QB 638 (the first to make the distinction); *West v Shephard* [1964] AC 326 (House of Lords approves the approach); *Andrews v Freeborough* [1967] 1 QB 1 (application where the claim is brought by the victim’s estate); *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174 (House of Lords re-confirms the approach).

⁵⁸ Explicitly e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-252.

⁵⁹ E.g. *Manning v King’s College Hospital NHS Trust* [2008] EWHC 3008 (QBD) [41].

⁶⁰ Above, II.1.

⁶¹ See generally Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-256 f. Cf. Lord Pearce (dissenting) in *West v Shephard* [1964] AC 326, 364 f.

A closely related question which one must also be clear to separate turns on the observability of the loss and the evidence required to establish its existence. ‘Subjective’ can in this sense be used to refer to the assessment process and establishing the existence and extent of loss by reference to the evidence of the claimant (returning to Descheemaeker, this is something he ascribes in current practice to pain and suffering and laments the arbitrariness which he sees as resulting⁶²). Losses can equally be established by proof of certain objective circumstances and assessed abstractly by reference to objective levels and sums to be expected in such circumstances.⁶³ Current practice makes use, in differing circumstances, of both options.

3. Anomalous satellites

The (relatively simple if uncertain) picture which has emerged above is of some combination of injuries and effects, some of which are termed subjective and some objective (and all potentially understood through the unhappiness they produce). Beyond that, and as part of the drive towards novel interpretations of damage/loss by rights theorists and the like, there are a number of objects of recovery which seem like broader satellites and which are generally treated as in some way anomalous. One of these cases is the award for loss of reproductive autonomy given to the parents of a child in wrongful birth/wrongful life cases.⁶⁴ The ‘factual worse off-ness’ aspect of the loss seems to lose its relevance there, with little to no attention given to the sort of issues which would usually manifest themselves under that idea.⁶⁵ The other is loss of congenial employment – a form of award given where the claimant has lost or lost the opportunity to have a career which is of particular importance for her in terms of fulfilment.⁶⁶ The reason why such an award is

⁶² Eric Descheemaeker, ‘*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 90 f.

⁶³ For an example, see *Kadir v Mistry* [2014] EWCA Civ 1177 [15] (Laws LJ). See further chapter 3.II.3.b-c for a discussion of classifying losses as subjective and the confusion which the evidential question can unleash.

⁶⁴ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309.

⁶⁵ The award is a set figure – e.g. *ibid.* at [8] (Lord Bingham).

⁶⁶ E.g. CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-104

distinguished from the more general idea of pain and suffering is considered unclear,⁶⁷ though the court's practice of making the distinction is not.⁶⁸ Loss of reproductive autonomy and loss of congenial employment are treated with particular contempt by, for instance, McGregor, who lists them after pain and suffering, loss of amenity, and even the now-abolished recovery for loss of expectation of life as a category of '[o]ther possible heads of loss'.⁶⁹ An introductory passage to the section alleges that they are not thought to be convincing as independent heads of loss and make regrettable inroads into the idea that a non-pecuniary loss award is singular.⁷⁰ As regards *Rees*, there appears to be an 'objective' sort of harm but one where there is no 'factual loss' proven or even discussed. The harm is instead understood to lie with an interference with a right or interest itself; no attempt seems to be made to look concretely at differences made to the life to the claimant as a result,⁷¹ with the end product being a very singular conventional award.⁷² As regards congenial employment, this is clearly subjective, but the reason why it differs from other subjective loss compensated under pain and suffering is unclear. These two are thus generally treated as exceptional and cannot (easily) be reconciled with the standard analysis,⁷³ though they are inevitably subjected to all but arbitrary reasonable sum awards.

Thus, the standard approach seems yet to have settled a clear understanding of these losses and as yet only accepts them as exceptional additions to the canon of losses. The courts, however, are clearly sufficiently content and comfortable in their intuitions about their status as independent,

⁶⁷ '[W]hy should there be a difference ... between the joy of work and the joy of play?' – Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-261.

⁶⁸ See for example, from the many cases which have awarded such a sum separately, the recent *Murphy v Ministry of Defence* [2016] EWHC 3 (QBD), and the Court of Appeal decisions: *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15; *Chase International Express v McRae* [2003] EWCA Civ 505; [2004] PIQR P21. Kennedy LJ explicitly says satisfaction from leisure activity falls under general pain and suffering – *ibid.* at [22].

⁶⁹ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38–260 ff. Indeed, at 38-055 that author refers exclusively to pain and suffering and loss of amenity as the recoverable heads. Cf. e.g. W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-066 (listing only pain and suffering and loss of amenity).

⁷⁰ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38–260.

⁷¹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 [18] (Lord Nicholls), [8] (Lord Bingham).

⁷² On 'conventional awards', see below, IV.1.

⁷³ Cf. Varuhas, for example, presenting *Rees* explicitly as an exception where recovery is justified despite no factual loss – Jason Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253, 269 – and, further, the entirely separate excursus for wrongful birth provided in Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38-278 ff. Cf. Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 288 ff (especially at 290 ff).

recoverable losses to award damages. This is probably unsurprising given that even the interworking of injury and effect ideas more generally, as well as the relevance of objective and subjective forms of suffering harm, seem to be problematic for even standard and well-settled items. In respect of the definition of the differential between two states sought by standard analyses as the target for compensation, therefore, even on its face more work is needed to properly explain damages practice and our intuitions about recoverable loss. A theory is needed which can clarify the relevance of the injury/effect dichotomy, the subjectivity/objectivity of loss, and the correct classification of apparent anomalies.

IV. The assessment system in practice

1. A conventional sum

With diminution in value ('factual loss') established as the dominant understanding of losses themselves, as well as the overriding concept of compensation in place, we can turn to the process of assessment and award in practice. In this sense, it is first and foremost important to note that the assessment of damages focuses on the use of 'conventional' sums or figures.⁷⁴ This seems to indicate two related ideas in different contexts: (first and most importantly) the sums are accepted as 'correct' to the extent that there is an established practice of recognising them to be correct based on previous comparable awards and general acceptance (there being no objective proof possible of the lost value conceptually entailed)⁷⁵ and (second) the sums are objective, arbitrary figures which are essentially not deviated from.⁷⁶ The *Rees* award for loss of reproductive

⁷⁴ See generally e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 28-249; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 29; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-07.

⁷⁵ E.g. *Wright v British Railways Board* [1983] 2 AC 733, 777 (Lord Diplock); *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174, 189 (Lord Scarman); *Wise v Kaye* [1962] 1 QB 638, 664 (Diplock LJ).

⁷⁶ The sort of award Lord Hoffmann seems to refer to as a 'modest solatium' in *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134, 147 (a meaning suggested by his thought that the range of factors involved would make identifying one fixed sum difficult). Cf. chapter 5.VI.2.

autonomy,⁷⁷ for instance, seems to be a conventional award in both senses – the courts are not really assessing any impact on the claimant, they are simply giving a fixed figure;⁷⁸ that figure is also ‘correct’ only insofar as it is generally recognised in practice to be the figure used. The treatment given to these awards is sometimes separated off, as in the structure of the Court of Appeal decision in *Shaw v Kovac*.⁷⁹ That decision does treat such loss awards as substantively the same as any other compensatory damages award, though, correctly identifying that the divergence lies only in the question of assessment of the damages sum. More orthodox awards for physical injury, for example, can be thought conventional (only) in the first sense – they are ‘correct’ insofar as they are accepted, but awards are made within the region of a general bracket in accordance with the accepted extent of the value loss (the sum is not a singular sum for all cases). The practice is explained further just below and is understood in terms of a loose ‘tariff’ of sums derived from past cases. With *Rees*-style conventional awards, by contrast, the value loss simply does not demonstrate the same range of extent.

In making the assessment of the conventional sum, the courts make use predominantly of previous decisions with comparable losses as well as guidelines produced and reviewed by the Judicial College to aid practitioners in understanding the categories and scales of award made previously. The guidelines are themselves, that is, descriptive of previous awards; however, they give an overview of categories and awards across the personal injury arena.⁸⁰ These sums are approached as a tariff scale, ranging from the most severe (tetraplegia) down to the most minor forms of injury; determining the award is based on placing the injuries at hand on that scale and selecting the sum from within an appropriate point in the relevant injury bracket.⁸¹ Where the Judicial College is considered not to provide a helpful guideline figure, parties may decline to cite from it – a circumstance felt to pertain by counsel for example in the *Manning* clinical negligence

⁷⁷ See above, III.3.

⁷⁸ See *ibid*.

⁷⁹ [2017] EWCA Civ 1028 [75] ff (Moore-Bick LJ) – contrast compensatory damages *ibid* at [58] ff.

⁸⁰ See Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015); their descriptive nature is expressly noted in Langstaff J’s Introduction (at xii).

⁸¹ E.g. Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 29, 271 ff; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-56; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 29.02 ff; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-075.

case. Where the harm consisted in the consequences of delayed cancer diagnosis, the absence of a listing for the same in the Guidelines meant they were not cited (and factually comparable past decisions were equally said to be hard to find).⁸² These two sources nevertheless form the bedrock of modern damages practice, guiding a sense of fair and appropriate figures though ‘[h]elp is to be obtained from any source wherever it happens to be available.’⁸³ The structure of the Judicial College’s guidelines betrays the important feature of the practice of making awards with a continuing and (to an extent) unexplained focus in practice on injuries rather than effects mentioned above.⁸⁴

There are a number of further inputs apparent from damages decisions which, to borrow the words of Lord Woolf MR, ‘will not dictate the decision, but they will inform the decision.’⁸⁵ The approach is a holistic weighing of various factors. The most important recent decision on this aspect of damages and their assessment is *Heil v Rankin*, where the Court of Appeal conducted an expansive review of the level of damages awarded and in which the Court asserted its competence to review and recalibrate the monetary values being considered.⁸⁶ This is not an approach (and a claim) without detractors,⁸⁷ but has (at least as yet) seen no authoritative challenge. The Court was there exceptionally considering a general uplift in the sums awarded as damages, through a selection of claims from across the injuries spectrum chosen to be joined together as a test cohort.⁸⁸ The issues highlighted are thus seen to be relevant to the setting of sums of money selected as damages awards at a general level (comparing the conventional system’s results as a whole), but equally several factors bear on ordinary, individual damages decisions.⁸⁹

⁸² *Manning v King’s College Hospital NHS Trust* [2008] EWHC 3008 (QBD) [41], though the judge himself did make use of the guidelines by comparing the illness to another cancer, mesothelioma, at e.g. [43].

⁸³ *Dureau v Evans*, Unreported, 13 October 1995 per Kennedy LJ, cited with approval by Mantell LJ in *Clarke v South Yorkshire Transport Limited* [1998] EWCA Civ 503. See also e.g. *Waldon v War Office* [1956] 1 All ER 108.

⁸⁴ To be contrasted with the strong theoretical commitment to effects; see above, III.

⁸⁵ [2001] QB 272, 297 (specifically referring to the economic impact of the level of damages chosen, but the sentiment more generally expresses the process here).

⁸⁶ *Ibid*, 292 ff.

⁸⁷ E.g. David Campbell, ‘The *Heil v Rankin* Approach to Law-Making: Who Needs a Legislature?’ (2016) 45 CWLR 340, arguing that it is both wrongly conceived and amounts to judicial legislation.

⁸⁸ See [2001] QB 272 [6] ff (Lord Woolf MR). Aside *Heil*, the cases (all reported *ibid*) were *Rees v Mabco*; *Schofield v Saunders & Taylor*; *Ramsay v Rivers*; *Kent v Griffiths*; *W v Northern General Hospital NHS Trust*; *Annable v Southern Derbyshire Health Authority*; *Connolly v Tasker*.

⁸⁹ The relevance of each will fluctuate in particular contexts. The broader social factors are clearly less prominent outside of the general sum-setting test case.

a) Factors for inclusion

Aside the obvious and primary issue of the extent of the harm/detriment at hand (very often understood in terms of medical assessment of an injury), the factors which are acknowledged as being considerations included in the sum-setting process were recounted in the *Heil* decision as follows:⁹⁰

i) Guidelines and previous awards

It is clear that current practice makes use of numerous monetary sums as assessment inputs. We have already seen that the tariff of monetary ranges provided in the Judicial College Guidelines is one such form, often currently said to provide a ‘starting point’ for assessment.⁹¹ This is then adapted using awards made in past cases which are said to be comparable and as found in the vast tracts of the personal injury quantum reports. The precise interworking of these two sources has been the cause of a fair amount of discussion, especially given the relatively recent appearance of the Guidelines (first appearing in 1993) and the simple fact that they are anyway primarily produced on the basis of past decisions.⁹² The Court in *Heil* straightforwardly endorses, unsurprisingly, this rough-shod orthodoxy.⁹³ As noted above, some awards instead take the form of more straightforward conventional sums, where the court has produced a singular, set figure intended to serve as damages for a particular loss.

ii) The value of money

⁹⁰ For another summary recounting (and a critical one), see e.g. Richard Lewis, ‘Increasing the Price of Pain: Damages, the Law Commission and *Heil v Rankin*’ (2001) 64 MLR 100 (especially at 104 ff).

⁹¹ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), xi to the effect that few cases are now decided without them.

⁹² *Ibid*, ix (Lord Donaldson, foreword to the 1st edn).

⁹³ [2001] QB 272 [99].

Next, the value of money, as judged by the Retail Price Index (RPI), was also employed by the court in *Heil* in applying the assessment framework.⁹⁴ Again, the importance of this factor is very clear – where the value of money varies and the aim of the compensation approach is to replace value, the monetary sum must be altered to maintain the value judgments in place. Likewise, when using previous awards as comparators, it is important to understand their value in current terms.

iii) Life expectancy

In the *Heil* case itself, an increase in life expectancy of claimants was seen to be relevant and involve two aspects – both the increase in life expectancy across the population generally, and the specific increases seen in modern times for sufferers of permanent disabling conditions.⁹⁵ In both respects, the focus for damages is on permanent injuries and the extended duration of injury associated with those longer lifespans.⁹⁶ This is therefore much the same issue as with the duration of an injury more generally – the longer an injury lasts, the greater the harm is understood to be, and even with injuries straightforwardly identifiable as permanent the length of time it will last is significant.

The form best placed to give effect to this as suggested in *Heil* was an extension of the size of the monetary bracket for serious conditions such that higher awards become available; that is to say there is no need to change our sense of the injury, but that room should be made for higher awards where the effects are felt for a longer lifespan.⁹⁷ The issue is clearly not a separate assessment point in the individual case; duration of injury must simply be properly understood.

iv) Public perception

⁹⁴ Ibid. Cf. also Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), xi (3.4% applied for RPI increases in the 2 years to April 2013).

⁹⁵ [2001] QB 272 [92] ff.

⁹⁶ Ibid.

⁹⁷ Ibid at [94].

More unusually, the Court also considered the importance of the idea that a sum awarded be understood to be fair, just and reasonable, as well as the importance of a sum's general relationship to standards of living in light of prevailing social, economic and industrial conditions.⁹⁸ In this respect, the Court stressed the need for the public to 'accept' the award as restorative of the loss suffered.⁹⁹ This is presumably meant in the straightforward sense that the system cannot function where public trust and acceptance in it is lost. It would be strange to find a claimant who would agree that any monetary sum would 'restore' them properly stated, and it is clear that there is no available calculation of the sum involved (hence the commitment noted above to a fair and reasonable sum), and so this requirement highlights the conventional nature of the award. It is considered correct (only) because the system maintains that it is correct, and the system takes cognisance of public perception as far as that acceptance is concerned. It does not merely rely on the opinion of judges.

v) The effect on insurance premiums and public resources

The Court in *Heil* also considered the effect (a general increase in) the level of awards would have on the insurance market and public services, especially the National Health Service.¹⁰⁰ The factor is used as one particular aspect of the generalised question of the perceived fairness, reasonableness and justice of a sum chosen in the light of broader social and economic conditions. The idea is not new, being referenced before by the likes of Diplock LJ (as he then was),¹⁰¹ but its mention is unusual. It makes a certain amount of clear sense, insofar as the public's perception of a sum (a key part of the convention of valuation) might well be influenced by the consequences of awarding it, ranging far beyond the immediate facts of the case.¹⁰² The point also seems to bear most particularly in the Court's mind when dealing with lower-value awards: in its Report on the issue

⁹⁸ Ibid at [53], [55], endorsing the Law Commission's general sentiments; e.g. ibid at [95] returning to fairness and justice in outlining their Lordships' conclusions.

⁹⁹ Ibid. at [55].

¹⁰⁰ Ibid. at [95].

¹⁰¹ *Wise v Kaye* [1962] 1 QB 638, 670.

¹⁰² Richard Lewis, 'Increasing the Price of Pain: Damages, the Law Commission and *Heil v Rankin*' (2001) 64 MLR 100, 105 ff, 109 f.

(which precipitated this test litigation), the Law Commission had proposed a boundary line for the start of a general increase in damages sums at £3,000; the Court of Appeal took a harder line and the economic consequences were the only explicitly stated reason for this particular departure from the proposal.¹⁰³ This would seem to go to a very basic economic point about risk distribution and financial burden; with such awards only a modest impact would be felt by any particular claimant, but the cumulated impact on the insurance industry/the social cost of an increase would be high.¹⁰⁴

The relationship between this consideration and the diminution in value orthodoxy, however, is problematic. In the absence of precise calculation, a fair and reasonable sum is chosen and notions of ‘fairness’ and ‘reasonableness’ can generally relate to broader distributive concerns, but it should not be forgotten that the sum is understood as a fair and reasonable *estimate of the value* of e.g. a leg lost in order to compensate the claimant on current theory.¹⁰⁵ The fairness and reasonableness of a sum *as a conventional stand-in for the value of the leg* seems to have less to do with the broader distributive points than, for instance, a general question of whether the sum is fair and reasonable as an award for the defendant to pay to the claimant. The practice of assessing the award thus again seems to conflict with the more fundamental theoretical commitments being made. A more consistent theory is needed to better accommodate these assessment features.

vi) Crossover with pecuniary loss.

In respect of the relationship between pecuniary and non-pecuniary loss awards, it has also apparently to be borne in mind that there is a ‘risk of double-accounting’.¹⁰⁶ The Court appears particularly sceptical of how the Law Commission framed this issue of overlap,¹⁰⁷ noting that the Commission approached the pecuniary and non-pecuniary losses as two separate kinds in principle with a need to amend for practical duplication. In accordance with orthodox theory, as outlined

¹⁰³ [2001] QB 272 [98]. Cf. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 3.21 ff, 3.34 ff. For a brief summary of the circumstances, see also Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) paras 9-085 ff.

¹⁰⁴ Richard Lewis, ‘Increasing the Price of Pain: Damages, the Law Commission and *Heil v Rankin*’ (2001) 64 MLR 100, 110.

¹⁰⁵ See above, II.2-3.

¹⁰⁶ [2001] QB 272 [96].

¹⁰⁷ *Ibid* at [72].

above, this would indeed seem to be wrong – both kinds of loss are understood as diminutions in value suffered by the claimant, such that both kinds can conceivably represent the same detriment.¹⁰⁸ Once again, assessment intuitions start to stand in conflict with theoretical commitments underlying dominant theory.

vii) Awards in other jurisdictions.

To a relatively uncertain, but certainly limited extent, the Court in *Heil* furthermore suggested that references to awards in other jurisdictions could be made, though it concluded concretely that the references to Northern Ireland deserved less emphasis and those to other European Union and European Free Trade Association states deserved more (with little explanation of why).¹⁰⁹ In respect of Northern Ireland it is said that: '[t]he fact that juries thought the awards appropriate for Northern Ireland does not mean that English juries would have come to a comparable decision'.¹¹⁰ That is certainly true in itself, but it remains a little unclear why the Court also felt the need to put *more* store behind other states' figures at the same time. The most natural interpretation would seem to be that references to other jurisdictions in a comparable economic condition are worthwhile in identifying an appropriate conventional sum for value, and this accords with clear reasoning in the Privy Council too,¹¹¹ but that the similarity of the Northern Irish legal system to the English system generally does not mean that (specifically) that system's damages figures should be especially closely related to England's. Insofar as a public, conventional sense of the value of the harms would seem to be an unrelated issue to the system of legal *liability* that is true. This accords with the important fact, discussed in later chapters as critical to this thesis, that liability and remedy questions (including actionable damage and recoverable loss) must be understood separately.¹¹²

¹⁰⁸ Cf. the further discussion in chapter 2.II.3.

¹⁰⁹ [2001] QB 272 [89].

¹¹⁰ Ibid.

¹¹¹ See *Jag Singh v Toong Fong Omnibus* [1964] 1 WLR 1382, 1385: '[The comparator cases used for awards] should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist.'

¹¹² See especially chapter 3.III.1.

b) Factors for exclusion

The courts have also been relatively clear in denying relevance in the assessment of damages sum to numerous factors. Amongst the most significant are:

i) The defendant's fault

The level of fault demonstrated by the defendant in committing the wrong for which liability is imposed is not a relevant indicator in assessing what sum represents a fair and reasonable damages award for the loss thereby sustained. The proposition is very clear and often repeated or alluded to,¹¹³ though its truth is not necessarily self-evident – historically fault had a role to play in damages assessment in England,¹¹⁴ and other jurisdictions still alter rules related to losses and their recovery with the level of fault demonstrated by a tortfeasor. In Austrian tort law, for example, *full* compensation of *concretely*-assessed loss is only available where a tortfeasor acts with intent or gross negligence; slight negligence will mean the liability extends to the compensation of *abstractly*-assessed *positive* or 'actual' loss (thus, in particular, not to lost profits).¹¹⁵ This is despite the fact that Austria is likewise focused on compensation as the aim of its damages practice.

This facet must also be carefully distinguished from a more general idea that the award made must be fair and reasonable not merely with respect to the claimant, but also from the perspective of the defendant.¹¹⁶ This clearly relates to an urge to rein in any exuberance in placing value on priceless aspects of the person – no doubt anyone when asked would place a much higher 'value'

¹¹³ See recently e.g. *Shaw v Kovac* [2015] EWHC 3335 (QBD) [23] (HHJ Platts).

¹¹⁴ See e.g. David Ibbetson, 'Tortious Damages at Common Law' in Gamauf, R (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Manz Verlag 2017), 102 f (the tort there is trespass, but in a period before modern negligence liability arose and where *liability* did not reflect mental fault – see *ibid.*).

¹¹⁵ See K-H Danzl, '§ 1324' in Koziol, H, Bydlinski, P and Bollenberger, R (eds), *Kurzkommmentar zum ABGB* (5th edn, Verlag Österreich 2017).

¹¹⁶ See e.g. *West v Shephard* [1964] AC 326, 356 f (Lord Devlin); *Fletcher v Autocar Transporters* [1968] 2 QB 322, 335 f (Lord Denning MR). Cf. CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-53 (contrasting full and fair damages). Fairness to society as a whole is equally a way to understand the relevance of broader economic effects of award levels seen above, IV.1.a.v.

for their leg, for example, than damages awards currently suggest. The balancing act is, though, certainly awkward on its face and places a degree of strain on the compensation of value notion.

ii) Impecuniosity and the effect the award will have

It is irrelevant whether or not the defendant or claimant has much money to begin with, and equally irrelevant whether an award under contemplation will bankrupt the defendant, or dramatically increase the claimant's wealth.¹¹⁷ In accordance, that is, with the focus on compensation and the change in the claimant's welfare position noted above,¹¹⁸ the assessment process looks at reversal of the change and not at the various positions of the parties objectively.¹¹⁹

Again, however, this needs to be considered in light of the discussions of the need to provide a moderate and reasonable sum and consider the justice of the award to the defendant.¹²⁰ The sorts of sums which would generally be ruinous, for example, might thus seem to be off the cards on the basis of unfairness and unreasonableness.

iii) The use to be made of the award

What use will or could be made of the damages award once provided to the claimant is irrelevant to the practice of assessing that award. This was accepted by the Court of Appeal in *Heil*,¹²¹ also alluding there to the application of the rule in resolving the problem of unconscious claimants. The latter represent very much the classic affirmation of the rule, with the claimant in each considered fundamentally unable ever to make any use of the non-pecuniary loss award (in contrast, of course, to the pecuniary loss awards made for inter alia medical expenses). Explicitly, in the face of the catastrophic injury in *Croke v Wiseman*, Shaw LJ maintained in defence of an award that its

¹¹⁷ *Croke v Wiseman* [1982] 1 WLR 71, 84 (Shaw LJ).

¹¹⁸ See above, II.1.

¹¹⁹ There are numerous alternate (normative) theories which do look to the objective position of the claimant. For a general evaluation of this sort of approach as against comparative ones, see e.g. Victor Tadros, 'What Might Have Been' in Oberdiek, J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014). Cf. the brief discussion in chapter 2.II.1.

¹²⁰ See above, IV.1.b.i.

¹²¹ [2001] QB 272 [24], for example.

apparent uselessness for the claimant's personal benefit is 'in a real sense' irrelevant and his Lordship immediately compares this to the very limited usefulness of a small award to a multi-millionaire claimant;¹²² to this extent, the point is closely related to the effect point immediately above. This rejection of the use made of money once awarded does, though, mark a stark contrast to the (admittedly limited) sense that the means by which the award is *funded* can be relevant as going to the question of fairness: society's involvement (through the NHS or as an insurance market) in the distributive impact of the award can be relevant, whilst the impact on the claimant herself is entirely secondary. Again, the compensation as value replacement idea is placed under a certain amount of strain as the focus shifts away from the claimant.

iv) Gross Domestic Product (GDP) and employment indices

In contrast with the use of RPI updates¹²³ as representative of the value of money, the court in *Heil* considered data on the nation's GDP and other indices related to the value of money to present no basis for increasing awards.¹²⁴ This contrasts somewhat with the account taken of general economic conditions in assessing perceptions of awards, and is thus perhaps indicative of a desire not to tie the broad social and economic conditions idea to any concrete, precise factor. Equally, as the RPI is satisfactory as a straightforward measure of the value of the money involved, there would be appear no reason to supplement the measure with others. In *Heil* itself, RPI is expressly lauded as a simple measure of money's value, and the complexity and uncertainty of the GDP figure regretted and so denied general usability.¹²⁵ The court is clearly not interested in complex mathematical calculation, but a generally acceptable, simple and usable assessment framework. Pragmatism is paramount.

v) Tribunal and jury awards and criminal injuries compensation

¹²² [1982] 1 WLR 71, 84.

¹²³ See above, IV.1.a.2.

¹²⁴ [2001] QB 272 [96].

¹²⁵ Ibid at [100].

As comparators, awards made by juries and tribunals and for criminal injuries are accorded no importance.¹²⁶ This serves to limit the boundaries of the ‘conventional’ aspect of the sum to the close-cut framework of other judicial personal injury awards. The conventional acceptance of the awards as correct, though bearing in mind broader public perception,¹²⁷ is thus not tied to any much broader social framework for awarding money. The assessment process is particular to its context and is treated in (certainly more manageable) isolation.

2. A single and lump sum

In assessing the various factors outlined above and the harm caused to the claimant in respect of a particular injury, the court does not generally break down its figures and reasoning (at least within non-pecuniary loss, which is viewed as singular); instead a single sum award is made as standard, considered fair and reasonable as a whole.¹²⁸ Thus, although there is a clearly accepted distinction between (subjective) pain and suffering and (objective) loss of amenity, it is not possible to identify the extent of each aspect in a particular case – amenity and pain are rolled into one.¹²⁹ This demonstrates very clearly the holistic nature of the assessment as currently understood and reinforces the wide discretion involved. Where multiple personal injuries are concerned, however, the courts must follow the approach of assessing each injury separately,¹³⁰ totalling those and then considering in the round whether the figure seems appropriate. This seemingly very important point (multiple injury cases are hardly rare) has required very recent confirmation in the case of *Sadler v Filipiak*,¹³¹ though judicial approval of the approach can be found much earlier.¹³²

¹²⁶ Ibid at [97].

¹²⁷ See above, IV.1.a.iv.

¹²⁸ See e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 35-272; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-066; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-070.

¹²⁹ Of course, a limited sense of the relative extent of those elements can be gained from comparing awards in cases with unconscious claimants (only ‘objective’ loss) with equivalent cases with awareness, but that gives only very limited data on how damages would break down.

¹³⁰ Within each generally of course giving no breakdown of the weight or value of the various factors, or the pain and suffering and loss of amenity elements, as just indicated.

¹³¹ [2011] EWCA Civ 1728.

¹³² In *Sadler*, Etherton LJ notes and endorses this method as set out (with the agreement of the full court) by Sir John May in the Court of Appeal in *Brown v Woodall*, Unreported, 12 December 1994.

Another potential element of an award which might be separated is of course interest, and this has proven something of a controversial feature of the law relating to non-pecuniary loss damages.¹³³ Interest is not generally available on non-pecuniary losses,¹³⁴ but statute requires, in the absence of any special reasons to the contrary, that simple interest be awarded on a sum of damages exceeding £200 in a case of personal injury or death.¹³⁵ The Court of Appeal endorsed a procedure for achieving this in the case of *Jefford v Gee*,¹³⁶ almost immediately after the first enactment establishing this mandatory position.¹³⁷ There Lord Denning M.R. stipulated that non-pecuniary loss was an indivisible sum, such that simple interest (at 2%) is to be awarded on the whole non-pecuniary loss figure, without distinguishing past and future elements of the loss, for the period between service of the action and the judgment.¹³⁸ This is to represent that the claimant has been ‘kept out’ of money which should be paid by the defendant as soon as the writ is served.¹³⁹ This practice for awarding interest on non-pecuniary loss was then approved in the House of Lords.¹⁴⁰ Some commentators, however, disapprove of that position¹⁴¹ and even Lord Denning himself later changed his mind on the point.¹⁴² The controversy focuses on two simple and key questions: what does the interest award achieve, and to what extent is that required in the context of non-pecuniary loss? If the award is for being kept out of the money one is owed, then interest should only be awarded on past loss. Equally it is unclear why a claimant is considered to be kept out of her money only from the point at which she serves the action rather than the point at which the action accrues. These twin irregularities – rendering the award in different respects both too low and too high – are seen by McGregor, for example, as part of an attempt to achieve balance: where a lump sum does not separate past and future loss, the courts can award interest on all (too much)

¹³³ On the following, see generally Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 18–050 ff; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), paras 10.45 ff; Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, paras 7.3 ff.

¹³⁴ See e.g. *ibid* at paras 5.12 ff.

¹³⁵ Senior Courts Act 1981, s. 35A (1), (2); County Courts Act 1994, s. 69 (1), (2).

¹³⁶ [1970] 2 QB 130.

¹³⁷ Administration of Justice Act 1969, s. 22.

¹³⁸ [1970] 2 QB 130, 147 f. Cf. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, paras 7.2, 7.8. The *Jefford* approach stands, though attempts are occasionally made to try and alter the terms of it; see e.g. *Manning v King’s College Hospital NHS Trust* [2008] EWHC 3008 (QBD) [71] ff.

¹³⁹ [1970] 2 QB 130, 146 f.

¹⁴⁰ *Pickett v British Rail Engineering* [1980] AC 136; *Wright v British Railways Board* [1983] 2 AC 773.

¹⁴¹ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 18–051 ff.

¹⁴² See *Cookson v Knowles* [1977] QB 913.

or none (too little) of it; they have chosen ‘all’ but offset that by reducing (all but arbitrarily) the relevant period to that after service of the action.¹⁴³ As with the ‘fair and reasonable sum’, a rough and ready quantification solution is employed in the face of a serious conceptual problem. The 2% interest figure itself is also controversial as a precise quantification figure with, though, little practical basis.¹⁴⁴

The single sum as assessed at trial is traditionally awarded straightforwardly as a lump sum to the claimant.¹⁴⁵ As a result of concerns over such issues as under-compensation and inaccuracy in value-setting, there has been movement in this respect in damages practice in general.¹⁴⁶ There is now the possibility of making a provisional award in personal injury cases where there is a chance of a serious development or deterioration in the claimant’s condition (such that the claimant can return for a reassessment if and when that risk is realised).¹⁴⁷ Inevitably there must be some particular diseases or deteriorations in contemplation, with an established risk of their occurrence.¹⁴⁸ Damages are then assessed assuming the possible future event will not occur, with the right reserved to return and assess it only if and when it does. There can also now be awards of general damages in the form of periodical payments, but this is only for future pecuniary losses and thus does not impact the present discussion of non-pecuniary loss awards.¹⁴⁹

3. Limited appellate interference

¹⁴³ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 18–095. Cf. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, paras 7.3–7.5: there is no conceptual relationship to service of the action; the 2% figure is only a very rough approximation.

¹⁴⁴ Ibid. and e.g. Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 10.47.

¹⁴⁵ Cf. e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-02; Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 175, 270; Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-003.

¹⁴⁶ See *ibid.* at paras 38-003 ff.

¹⁴⁷ Senior Courts Act 1981, s. 32A. See generally Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) paras 9-096 ff. For a practical example, see e.g. *Loughlin v Singh* [2013] EWHC 1641 (QBD); [2013] Med LR 513.

¹⁴⁸ SCA 1981, s. 32A(1); Practice Direction, 1 July 1985 [1985] 1 WLR 961.

¹⁴⁹ Damages Act 1996, s. 2(1).

Once an award is so made, appellate interference with the sum will occur only in quite extreme circumstances – essentially where the sum is considered manifestly wrong¹⁵⁰ and once these limited appellate options are exhausted (and assuming no provisional damages award has been made), the sum awarded is final.¹⁵¹ It was noted briefly above that this is somewhat inevitable given that the sum is understood as an estimate of the value which should fairly and reasonably be paid in damages as representing the loss and is thus born of a very broad discretion.¹⁵² In the exercise of that discretion (and the absence of ‘correct’ figures for a calculation), one judge’s particular choice of figure is no better than any other’s provided the basic terms of the discretionary exercise are complied with. There are a number of other reasons which also contribute to this rule. Much of the reasoning supporting this idea also focuses on an appellate court not knowing the facts as intimately as the trial judge and being unable to examine the parties and their witnesses. Again, the recent *Sadler* case is instructive, with the court relying on the trial judge’s descriptions of the injuries even when provided with photographs themselves, because ‘the judge had the additional and important advantage of being able to view the scarring for himself both in natural and artificial light.’¹⁵³ This aspect of the reasoning has an ancient pedigree.¹⁵⁴

The high bar for re-examination which results (in part) from these ideas has thus equally stood the test of time.¹⁵⁵ It represents in turn an important reason why there has been relatively little high-end judicial discussion of loss and assessment issues and it demonstrates clearly the uncertain and fact dependent nature of the damages enquiry. When those issues do surface on appeal, it is also important to note that it is generally recognised to be the Court of Appeal which is best placed to deal with such issues, given that court’s members’ more recent experience of assessment at trial.¹⁵⁶

¹⁵⁰ E.g. *Housecroft v Burnett* [1986] 1 All ER 332. Cf. e.g. Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 29.03; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-072; CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-99.

¹⁵¹ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-054.

¹⁵² Above, II.3.

¹⁵³ *Sadler v Filipiak* [2011] EWCA Civ 1728 [20] (Pitchford LJ).

¹⁵⁴ See e.g. David Ibbetson, ‘Tortious Damages at Common Law’ in Gamauf, R (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Manz Verlag 2017), 100 ff.

¹⁵⁵ See *ibid.* and at 104 f. Cf. e.g. *Gilbert v Burtenshaw* 98 ER 1059; (1774) 1 Cowp 230 – it is not sufficient that the judge would have given less, the sum must appear ‘flagrantly outrageous and extravagant’ (Lord Mansfield).

¹⁵⁶ See *Wright v British Railways Board* [1983] 2 AC 773, 785 (Lord Diplock).

Attention therefore needs to be paid throughout to the different precedential value which might be placed on decisions in this area.

V. Conclusion

By way of conclusion to this opening chapter, it is, firstly, important to stress again the key features of non-pecuniary loss damages practice as they have appeared. Compensation (as value replacement) is presumed from the very start and is the foundational principle from which all else proceeds. Non-pecuniary loss appears as secondary to, and is dealt with by analogy to, pecuniary loss – the same approach carries from the one to the other. Given a value replacement ideal and this analogy to financial detriments, loss inevitably comes to be conceptualised as a value differential in the claimant's position.

As far as the assessment of damages awards is concerned, the enquiry focuses on the need to identify a fair and reasonable sum which can be said to represent (and accepted as representing) the extent of the value diminution experienced by the claimant. There is no separate assessment of the value diminution and the damages sum – a singular analysis of an appropriate sum serves the dual function of identifying and quantifying the loss and assessing the damages award. 'Fair and reasonable' is the qualifier for the sum involved, which responds to the fact that no sum is calculable – a fair estimate stands in the stead of a 'correct' figure. In making that assessment, a broad range of factors can come into play. Most importantly, there is a strong focus on previous practice and the acceptance of particular ranges of figures by convention. Much broader distributive concerns enter into the discussion as part of the 'fair and reasonable' idea, in each case drawing the idea further away from the more straightforward sense of value replacement. Non-pecuniary loss awards are seen as singular. Throughout the enquiry it is clear that there is a great deal of judicial discretion and that the enterprise is an inexact and very flexible one.

This outline, intended to be descriptive, has already had to identify a number of difficulties which arise from the traditional understandings, demonstrating significant fault lines in (and particularly between) the practice and theory of non-pecuniary loss damages. Examples include the

uncertainty over the interrelation between injuries and their effects (especially with practice very focused on injury descriptors and theory concentrated more on the effects of injury) and ‘objective’ and ‘subjective’ elements of loss. Moreover, the conceptual leap from the loss to the damages assessment exercise entailed by the lack of market value for the harms concerned leads to a much more general idea of fairness and reasonableness. This manifests in the introduction of much broader distributive ideas in the assessment enquiry. A similar leap to assessment occurs in respect of the award of interest on non-pecuniary losses, attempting a rough balance of the theoretical need for different calculations for past and future harms and the competing conceptual imperative that non-pecuniary loss is (roughly and in theory) singular.

A certain amount of conceptual inadequacy is thus already clear to see; the orthodox framework has far from settled various concerns about the correct approach to making damages awards for non-pecuniary harms and builds into its core a number of conceptual demands that cannot be satisfied. This prompts rough, practical and assessment-oriented solutions. The next chapter will now begin to open up these and other cracks in the orthodox analysis in preparedness for the reconceptualisation which is therefore required and forms the core of this thesis. What that new concept will mean for the further elements of existing practice outlined here arises for investigation in chapter six.

Chapter 2 – The Loss Problem

I. Introduction

This chapter will move on from the overview of the dominant conceptualisation of compensation for loss (as value diminution defined by counterfactual comparison) given in chapter one. The aim now is to interrogate that baseline understanding further than was there possible, considering in particular what the basis is for identifying a non-pecuniary loss as a loss. The analysis will thereby identify the multiple problems associated with attempting to explain loss and recovery for it in terms of compensation for diminution in value. By way of conclusion, it will consider three prominent, existing alternative proposals for understanding loss and whether they actually serve to resolve those difficulties coherently. It will be seen through the discussion, in combination with that contained in chapter one, that existing analyses are deficient in not engaging in any useful sense with the meaning of loss in this context; it is most often viewed as an intuitive, even primordial idea, and often understood only obliquely through the lens of compensation. At the more abstract level, all losses are thus treated the same and any difficulties are resolved at the level of calculation of the final award sum. This indicates a broader confusion of loss identification with damages assessment, which in turn leaves the judge with broader and more unstructured discretion: the neglected role of identification is to label and encapsulate the loss in a normatively satisfying way and to define the areas of discretionary damages assessment. The loss ideas which do emerge, however, are either conceptually or practically unsound and the result is not a defensible position.

‘Loss’ as it is at issue here should be distinguished at the outset from ‘damage’ in the sense of the requirement that there be actionable damage to establish liability in

negligence. This did not feature in chapter one; under the current orthodoxy little if anything is understood to turn on the distinction (with both being seen as requiring a value loss sense of being worse off), if any distinction is even understood to exist. It is equally not generally the subject of any discussion in the literature on damages.¹ The distinction will, though, be important for later chapters when a new framework is constructed;² for present purposes, however, it suffices to say that ‘damage’ in that context refers to the requirement that there be a harm of a relevant kind and seriousness such as to establish liability, generally requiring more than merely trivial harm.³ ‘Loss’ meanwhile is a remedial, not a liability issue. It concerns the consequences of a wrong for which a remedy is to be provided; it is the *bad* entailed by the *wrong* for which a sum of money is awarded as damages. The actionable damage involved can, however, often be critical in delineating the (sorts of) losses recoverable as damages (a connection manifesting generally as a causal point – losses which follow the damage are recoverable, those which follow from non-actionable detriments are not).⁴ Only loss is of interest in this chapter, not damage.

It should also be made clear at the outset that it is still presupposed that it is appropriate to make substantial damages awards for non-pecuniary losses in negligence. This position is often criticised, most prominently on the basis that the system offers too little benefit given the impossibility of truly restoring the claimant, and/or that it is too expensive to run, with distributive, insurance concerns being considered paramount.⁵

¹ See chapter 3.III for fuller discussion and cf. Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 OJLS 255, 270 ff for a very recent, rare discussion of the distinction (recognising equally, at 270 f, that the distinction is mostly unseen). To give one example, discussed further in chapter 3.III.2, in the area of psychiatric injury treatment of the recoverable ‘losses’ (at the damages assessment stage) is not discussed except by reference to the liability-establishing rules on duty and actionable damage – see e.g. Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), ch. 7.

² See especially chapters 3.III and 5.III. Loss will achieve greater independence and analysis of loss will differ from analysis of damage.

³ See e.g. *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] 1 AC 281.

⁴ See generally e.g. JK Mason, ‘Wrongful pregnancy, wrongful birth, and wrongful terminology’ (2002) 6 Edin LR 46 – whether damage lies in, for example, being pregnant or giving birth determines whether e.g. the pain of birth, discomfort of the pregnancy itself etc. are recoverable.

⁵ See e.g. Richard Lewis, ‘Increasing the Price of Pain: Damages, the Law Commission and *Heil v Rankin*’ (2001) 64 MLR 100; S Croley and J Hanson, ‘The Non-Pecuniary Costs of Accidents: pain-and-suffering

Respondents to the Law Commission's recommendations on non-pecuniary losses, in particular, included several concerned about limited resources and high costs (as well as awards not really compensating claimants in any event).⁶ The obvious and well-worn counterargument to this, though, is the broadly established consensus that claimants simply should in fact be able to recover (and recover substantially) for non-pecuniary losses, even if the system is seen to have these defects.⁷ The relevant objects of the detriments, such as personal bodily integrity, are simply very important (more so than property) and injury to them cannot be dismissed without any form of redress. Any new concept or framework will need to account for flaws in, and criticisms of, the current system, but will proceed on the basis that the relevant detriment should be recoverable in some form. This premise will be fundamental to understanding the critique of existing analyses considered in this chapter:⁸ whilst a number of very important problems with the current orthodoxy will be raised, it is maintained that these can be resolved without simply abolishing recovery.⁹

Finally, before embarking on the analysis itself, it is perhaps also helpful to note that difficulties in this area in part draw upon broader terminological concerns. In a standard practitioners' work on damages, simply defining 'damages' itself requires extensive treatment.¹⁰ Combining this with the minimal consideration given to the similar question of the meaning of 'damage' for establishing liability,¹¹ we might say it is perhaps inevitable that there would be at least some fluidity in discussions of loss. According to

damages in tort law' (1995) 108 Harv L Rev 1785; Louis Visscher, 'Tort Damages' in Faure, M (ed), *Encyclopedia of Law & Economics* (Edward Elgar 2008) with further references.

⁶ See Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.11. Cf. *Heil v Rankin* [2001] QB 272, especially at [29] (Lord Woolff MR).

⁷ See for example the Law Commission's justification of recovery – Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.1 f, including, at paras 2.12 f, for unconscious claimants (and further Law Commission, *Personal Injury Compensation: How Much Is Enough?* (1994) Law Com No 225, 210) – noting the support of the public and of consultees.

⁸ As well as later discussions, of course, particularly chapters 3, 4.

⁹ A feat achieved in particular through a different, loss-first approach; see chapter 3.I, II.

¹⁰ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 1-001 ff. Cf. similar issues with the measure used for calculating damages – see Jane Stapleton, 'The normal expectancies measure in tort damages' (1997) 113 LQR 257.

¹¹ See e.g. Donal Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59; K Amirthalingam, 'The Changing Face of the Gist of Negligence' in Neyers, JW, Chamberlain, E and Pitel, SGA (eds), *Emerging Issues in Tort Law* (Hart 2007).

McGregor, compensation is given for damage, loss or injury suffered, understood interchangeably.¹² The field of non-pecuniary damages in negligence is rife with terminological inconsistency and imprecision of this sort, and this initial difficulty builds in immediate ambiguities. There is flexibility over what each of those terms individually might mean and how broad they can be.¹³ Cane, for example, refers to pain and suffering and loss of amenity as two ‘types’ of ‘injury’¹⁴ and the same work refers to non-pecuniary losses as ‘intangible’, which might seem odd to a claimant who has lost a leg.¹⁵ Atiyah deployed both pain and suffering and loss of amenity separately, but each seemingly synonymously with ‘damages for non-pecuniary loss’.¹⁶ It is most obviously something of a linguistic stretch even to describe pain as ‘loss’ (the clumsy usage likely a function of the predominance and relative simplicity of pecuniary loss-driven analysis¹⁷). An attempt will be made here to maintain consistency in the terms used, as outlined above and in the Introduction.

II. Diminution in value

The aim of this section is to begin to reveal deep-seated inconsistencies and difficulties in the idea of loss inherent in the compensatory diminution in value approach outlined in chapter one. This will focus in particular on the key issues of the notion of ‘factually worse off’/the difference made by a wrong, the idea of value and quantity, and overlap between

¹² Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001 and n 1; Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 104, adding ‘harm’. Cf. immediately above on the loss/damage distinction.

¹³ See e.g. John Goldberg, ‘Two Conceptions of Tort Damages: Fair v Full Compensation’ (2005-2006) 55 DePaul LR 435, elucidating two senses of ‘injury’ in the context of a discussion of *damage* and explaining the implications for confusion in understanding the choice of underlying *damages* principles.

¹⁴ Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1.

¹⁵ Ibid.

¹⁶ Patrick Atiyah, *The Damages Lottery* (Hart 1997), 14.

¹⁷ See chapter 1.II.1.

heads of loss. A pragmatic tendency of courts and commentators simply to ignore these and other concerns will also be highlighted.

1. Factually worse off

We have seen that the ‘basic criterion’ for determining an award is what a claimant has lost, rather than what should be paid by a defendant, in pursuit of the compensatory aim.¹⁸ Even that baseline proposition is difficult, though, with non-pecuniary losses. For such damages, we still do not ask what the defendant can pay exactly, but the courts have to make use of the ideas of fairness and reasonableness to set an award (i.e. what the defendant must pay) as the value of what is apparently lost to the claimant,¹⁹ where such fairness and reasonableness is assessed with a view to defendant-oriented as well as broader distributive concerns.²⁰ The boundary between ‘what has been lost’ and ‘what should be paid’ thus does not exist with non-pecuniary loss in its usual form. With pecuniary loss, a value sum is lost and (therefore) the same sum is to be paid – the latter is accessed via the former (to that extent it is of course wrong to treat these ideas as alternatives; they form a progression). With non-pecuniary loss the reverse is true; the fair and reasonable damages sum is assessed and then treated by convention as the value lost.²¹ On occasion the distinction has openly crumbled in judgments in the highest courts; *West v Shephard* is one example, with Lord Devlin’s approach asking what sum would discharge the defendant’s moral obligations.²² Whilst the thrust of that opinion remains a minority view, it highlights particularly bluntly (as does the longevity of dissentient stances on the

¹⁸ See chapter 1.II.2.

¹⁹ See chapter 1.II.3.

²⁰ See chapter 1.IV.1 (especially at a.iv, v and b.i, ii).

²¹ See chapter 1.II.3; the sum was seen to be created *ab ovo* as the award.

²² See *West v Shephard* [1964] AC 326, 356 f. Cf. *Fletcher v Autocar Transporters* [1968] 2 QB 322, 335 ff (Lord Denning MR).

basis for non-pecuniary losses²³) that there is justified conceptual discomfort over the perspective (claimant or defendant-centric) taken to loss and damages assessment. This must also be understood against the discussion of assessment factors accepted by the Court of Appeal in *Heil* as discussed in chapter one – several were seen to draw focus away from the claimant’s loss.²⁴

This speaks immediately to a difficulty whose resolution will form the bedrock of this thesis’ approach to the loss idea – a clearer separation and progression must be established and maintained between the identification of a loss and the calculation of a sum in damages to be awarded in response to it.²⁵ Dominant thinking resolves the problem instead by emphasising, as shown in chapter one, the assessment and compensation questions to the detriment of real conceptual engagement with what the loss is (repeatedly an assessment solution was seen to be offered for what are conceptual problems). McGregor’s exposition of the law here is orthodox in failing to differentiate these appropriately – he outlines a focus on compensation and value assessment based around comparison with the state the claimant would otherwise have been in, without first isolating more than an intuitive notion of loss.²⁶ That notion really just describes them as relating to ‘interests not immediately connected with monetary considerations’,²⁷ an aspect he is doubtless right to note, but he thereby abandons the question of identifying the loss to the compensation aim said to be foundational. What follows from the presumption of compensation is that loss is whatever compensation corrects and the exercise therefore begins to look circular: loss is what is corrected by compensation *for loss*. What is missing in reality is a primary outline

²³ See below, IV.

²⁴ See chapter 1.IV.1.a, especially at v.

²⁵ See especially e.g. chapter 3.II.4. Causation of the identified loss by the wrong also represents an analytical stage, of course.

²⁶ See the outline at chapter 1.II.2.

²⁷ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 5-002. Cf. also e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-20: ‘Pecuniary loss is that which is susceptible of direct translation into money terms...while non-pecuniary loss includes such immeasurable elements as...’; Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 5.12; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 4.01 (not directly computable).

of how the various accepted detriments actually qualify as loss; compensation (or any responsive aim) can only be chosen after there is a clearly identified loss to try and respond to.

The other example of a loss discussion presented in chapter one was Cane's archetype portrayal, which does not place compensation first.²⁸ The core was 'things which [the claimant] had before ... but ...does not have now' and this widened to incorporate 'harm' and 'damage' imposed.²⁹ It is important to note that a claimant might not have 'had' a limb in the same sense as she 'had' money or an item of property, despite Cane sweeping those together; little regard is being had for any more fundamental differences of kind between pecuniary and non-pecuniary loss. Such an approach raises numerous other difficulties, both through its temporal outlook and its comparative framework. The temporal basis of Cane's core idea is a problem insofar as it differs from the counterfactual analysis adopted as standard and which follows naturally when one reads back through a compensation understanding (putting the claimant where she would have been) to arrive at loss. It was noted in chapter one that Cane's definition switches to incorporate losses identified by reference to counterfactual comparison (as he extends beyond the core of his loss archetype) and the non-pecuniary losses involved are again treated the same way as pecuniary harms, falling under a general umbrella of 'made worse off (in some sense)'.³⁰ As far as the assessment stage is concerned, Cane (albeit in a different work and no doubt carrying forward its original author's extreme scepticism) switches tack to acknowledge a difference of approach: 'The calculation...has an air of unreality about it. Something that cannot be measured in money is "lost", and the compensatory principle requires some monetary value to be placed on it. There appears to be no objective way of working out

²⁸ See the outline at chapter 1.II.2.

²⁹ Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 103 f.

³⁰ Ibid, 104. Cf. Stevens' 'factually worse off' – Robert Stevens, *Torts and Rights* (OUP 2007), 59, 78.

any relationship between the value of money....and damages [for PSLA].’³¹ As with other analyses, the difficulty is only dealt with as an issue of measurement – a principle is invoked at the outset which requires the impossible,³² and this is maintained regardless of whether it does violence to the (rarely and ill-articulated) concept of loss. The question of loss’ very existence is blurred into the practical impetus to quantify something. Cane ices his cake by noting that ‘we refer to damages awarded in all these situations...as “compensatory”’.³³ This expresses not simply that non-pecuniary losses cannot properly be replaced and so compensated,³⁴ but also a deeper idea: (unusually) Cane frames a loss concept without compensation as its starting point. He fails, however, to exploit the freedom thereby gained to produce a more workable loss concept.

Beyond the resurfacing elision of identification and assessment, the focus on a general sense of ‘being worse off’ helps render Cane’s outline of loss too vague to be any more useful than the word ‘loss’ itself is and, by opening up the possibility of temporal as well as counterfactual comparison for identification (without any explanation as to when and why the shift may occur), the concept perhaps becomes even broader and less useful in practice than the less explicit, counterfactually-formed loss ideas in works like McGregor’s. We have no further conceptual information on what ‘senses’ of being worse off are relevant, when a loss might properly be identified temporally/counterfactually, or even whether ‘worse off’ may be subjective as opposed to objective. A similar archetype

³¹ Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1. Strangely, there does seem to be a level of doubt over what the editor (of a number of editions) has elsewhere plainly described as loss (see the discussion directly above); ‘loss’ and ‘losses’ in 6.5.1 of *Atiyah’s Accidents* enjoy inverted commas. Cf. e.g. *Heil v Rankin* [2001] QB 272 [20] ff, [23] (Lord Woolff MR) – ‘Any process of conversion must be essentially artificial.’ See also *Wright v British Railways Board* [1983] 2 All ER 698, 699 (Lord Diplock): it ‘cannot be other than artificial’.

³² See below, II.2, on value.

³³ Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 104.

³⁴ See chapter 5.VI.1 on compensation. It appears Cane sees a strong punitive current in non-pecuniary loss awards – see e.g. Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.4. On punishment, cf. chapter 5.VI.3.

framework of definition is used by Tettenborn (in a highly unorthodox approach),³⁵ who focuses the ‘core’ of loss on direct and measurable *pecuniary* effect on the claimant. His analysis sees non-pecuniary losses as cases ‘outside the penumbra that cannot be assimilated to cash losses’.³⁶ This honest acknowledgement of difference is welcome, and this thesis will likewise decline to see pecuniary and non-pecuniary harms as comparable,³⁷ but (as will be seen³⁸) that author’s offer of an alternative concept has its own flaws.

Turning to consider the use of a comparative account of non-pecuniary loss, as both varieties of account do, it is clear that there are numerous structural difficulties. Three are particularly significant for present purposes. The first amongst them is that a temporal comparative, state-based outline (which for Cane at least is a core part of a unitary loss idea) cannot properly account for what have been termed ‘preventative harms’;³⁹ that is to say situations where the sufferer is no ‘worse off’ as against any prior position in which she found herself, but where her position would otherwise have been better.⁴⁰ A counterfactual accounting can resolve that problem perfectly well – the sufferer would have been in a better position but for the action complained of, but again it is not clear where we may analyse temporally and where counterfactually on accounts which admit both. An explanation as to that boundary line is critical – it is decisive for the content of loss. There is, moreover, a parallel difficulty in the second point here – counterfactual accounting cannot identify what have been termed ‘pre-emptive harms’.⁴¹ These are situations where a person suffers a harm, but would otherwise have suffered an equal or yet

³⁵ Andrew Tettenborn, ‘What is a Loss?’ in Neyers, JW, Chamberlain, E and Pitel, SGA (eds), *Emerging Issues in Tort Law* (Hart 2007), 441 f. The unorthodoxy of, and lack of broader support evident for, such an approach is its reason for exclusion from chapter 1.

³⁶ Ibid, 444. Cane, of course, integrates non-pecuniary losses throughout his levels of departure from the core.

³⁷ See especially the criticism of quantitative understandings of loss below, II.2.

³⁸ Below, IV.4.

³⁹ For the terminology, see Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 427.

⁴⁰ This should not be confused with liability for omissions – the question here is of the results of wrongdoing and the changes in the claimant’s state, not on the acts or omissions of the defendant. There is of course nevertheless overlap between the situations concerned.

⁴¹ Again, for the terminology, see Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 434.

greater harm. Such situations have been discussed many times; examples include an innocent victim of a car accident otherwise due to board a flight which crashes killing all passengers,⁴² or the ‘Apostle of the North’, injured travelling to his execution for heresy, which in turn caused a delay long enough for the accession of (Protestant) Elizabeth I to save him.⁴³ But for the tortious action the sufferer would be yet worse off, such that counterfactually there seems to be no loss despite such a conclusion seeming unsound. The dominant accounts which use counterfactual comparison face a problem here for that reason. Meanwhile, those like Cane’s which to an extent seem to accept a temporal comparative framework have no problem in identifying loss, provided (which is not clear) that this is a situation where temporal comparison is acceptable.

Two connecting threads between these situations are that it is unclear how losses can be individuated and how the relevant comparator points are to be chosen. There are clearly important normative choices being made in determining what is and is not included in any choice or change between temporal and counterfactual comparison, what temporal positions are relevant as the ‘current’ and ‘comparator’ situations, and what facts are relevant in determining the ‘position’ of the claimant at those points. The terms in which these issues are framed will produce significant divergences in result, but these issues do not feature in standard accounts of loss.⁴⁴ The enduring impression is of an intuitively clear concept where loss is anything but. Importantly, too, the questions look very much like causal problems, but this simply demonstrates a confusion of causal and loss thinking: loss and causation are understood by reference to same question of divergence of actual and counterfactual from the point of wrongdoing. There might seem to be duplication in setting

⁴² E.g. Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 OJLS 255, 263; cf. Bruce Chapman, ‘Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice’ in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 415 ff (sinking ferry).

⁴³ As recollected in *Theobald v Railway Passengers Assurance Co* (1854) 26 Eng L & Eq R 432, 438 by Alderson B, who considered that the man was ‘injured’ (presumably in the sense of *iniuria*; i.e. he was wronged) but ‘suffered no detriment’ (presumably meaning there is no loss; such a conclusion is highly debateable and intuitively problematic).

⁴⁴ Cf. the problem of arbitrary selection discussed below, III.2.

out both, but both are important, functionally independent enquiries. Equally, it is important that demonstration of causation of loss can logically only *follow* an identification of a loss.

Considering a third and final question, if we draw on the second example in the previous paragraph again, we might question why exactly it is that one can or cannot identify a recoverable loss (or indeed any harm or detriment) in death. After the claimant's decease, there can be no proper comparison with the claimant's state, howsoever understood.⁴⁵ We might think of inflicting death as inherently bad for the deceased, but we cannot establish this by comparing how well off the claimant was before or would be but for the tort with the claimant's current non-existence.⁴⁶ Nevertheless, the courts seem to be clear that death is not itself loss (or indeed actionable damage).⁴⁷ Whilst this thesis will neither endorse nor deny that answer,⁴⁸ it must be stressed that the applicable concept of loss should guide and explain that choice just as it does any other normative decision on what counts as a loss. A state comparison does not and cannot do this. Discussions relating to (non-)recovery for death (pecuniary and non-pecuniary) in fact turn often on various policy ideas instead, such as concerns about floodgates, the absence of benefit to a claimant in recovering for death, or that heirs of the deceased might (potentially) be over- or under-compensated.⁴⁹ There is no discussion of the underlying question of why policy or any other arguments deserve attention here at all; orthodoxy seems to provide no

⁴⁵ I.e. whatever 'currency' we choose to measure any particular state in – on which cf. Victor Tadros, 'What Might Have Been' in Oberdiek, J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014), 173 ff.

⁴⁶ See e.g. Matthew Hanser, 'The Metaphysics of Harm' (2008) 77 *Philosophy and Phenomenological Research* 421, 437 ff – there suggesting that judging whole-life welfare might start to overcome the problem, a solution unavailable as regards making loss decisions in negligence. Cf. Donal Nolan, 'Rights, Damage and Loss' (2017) 37 *OJLS* 255, 263.

⁴⁷ See below, chapter 4.VI.

⁴⁸ Not least because the choice on the new framework created here will be seen to be rightly one of policy – see chapter 4.VI.1.

⁴⁹ See e.g. the policy-driven tenor of Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), ch 39 passim or the Law Commission's approach to bereavement damages: Law Commission, *Claims for Wrongful Death* (1999) Law Com No 263, paras 6.32 ff, 6.37 ff, 6.44 ff.

conceptual room for anything other than value differential. Death is therefore a problem for comparative accounts.

As a final note here, a simple switch to a state-based, non-comparative framework (where the bad is defined in terms of one state; that in which the claimant is left after the wrong⁵⁰) for loss will not serve in remedying these problems because such an approach would equally be unable to replicate fundamental damages rules and intuitions in the law of negligence. It seems clear that a claimant should recover for the bad which befalls her even where she is, by whatever apparently objective standard, not left ‘badly off’, and there is no question of engaging with the claimant’s position except insofar as it has been changed by the wrong.⁵¹ It is thus possible to see problems in respect of both the comparison and the focus on the claimant’s state.

The problems outlined here for comparative, state-based accounts are important, however, and the dominant theoretical approach does not deal with them fully. We must understand how the definitive boundaries for identifying a loss are set. Having swept all gradations of loss together under a ‘worse off’ frame, Cane’s analysis moves on, whilst McGregor’s exposition turns to discussion of the particular heads of damages and likewise raises peculiarities only in terms of quantification. As seen in the outline provided in chapter one, numerous other commentators share precisely the same expositional approach, without any of them engaging with: the confusion of identification, assessment and cause; the finer issues of a comparative state approach; or the more specific problem of death. A compensation bedrock produces a basic counterfactual comparative account. Problems relating to the loss and its nature are then reduced to the simple, practical issue of isolating a monetary sum (assessment) as if there were no more abstract difficulty.

⁵⁰ See generally e.g. Victor Tadros, ‘What Might Have Been’ in Oberdiek, J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014).

⁵¹ Cf. the example of a millionaire used by Shaw LJ in discussing the (for much the same reason equally irrelevant) question of the impact a damages award has on the claimant: *Croke v Wiseman* [1982] 1 WLR 71, 84. On the latter point, see further chapter 5.VI.

2. Quantity and value

The assessment and quantification emphasis just discussed also relates to an aspect of non-pecuniary loss noted in chapter one⁵² which has often prompted discussion (and will here) – the fact that it is still understood in pecuniary terms. Working against a background commitment to the priority of compensation (as value replacement) and with critical questions of the nature of loss and its identification pushed aside in favour of assessment/quantification issues, it is inevitable that non-pecuniary loss emerges as a value idea. Indeed, it is worth stressing again that the entire counterfactual comparative state approach employed in practice is termed the ‘diminution in value’ approach.⁵³ The associated problems must now be drawn out more clearly.

Turning back to McGregor’s standard explanation of the law, it is clear that he understates the disjuncture between non-pecuniary losses and money; not merely are these interests ‘not immediately connected with’ money,⁵⁴ they are often *deliberately removed* from ideas of monetary valuation. Whilst even on its own terms ‘indirect connection’ in that author’s sense can only mean courts relating awards to previous court awards (a practically pivotal exercise, but one currently lacking enough principled bedrock⁵⁵), it is not unreasonable to be concerned at the proposition that life or limb could have a ‘value’ placed on it,⁵⁶ but this is the core of the present approach of the courts and commentators.

⁵² See especially chapter 1.II.1, 2.

⁵³ E.g. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.4; Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 105; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-069.

⁵⁴ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001 and n 2 there; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-20; Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 4.01; Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 5.12: ‘cannot be fully quantified in monetary terms’.

⁵⁵ With the solution proposed in this thesis, previous awards maintain their importance – see especially chapter 6.II.2 – but a solid conceptual basis is provided for the entire exercise.

⁵⁶ Consider simply claims for the financial consequences of ‘wrongful birth’ as a related issue, particularly the selection of statements of moral outrage from various jurisdictions given by Lord Millett in *McFarlane v Tayside*

The Law Commission recognises the fact⁵⁷ and sees no peculiarity in simultaneously recognising that ‘the fairness of awards is partly reliant on their being perceived to be fair’.⁵⁸ The implications of the whole is that there is not only, practically speaking, a ‘fair value’ to be placed on persons and aspects of their personhood, but that a ‘value’ which they ‘should’ have is contingent on how the particular society values them.⁵⁹ This is at least less uncontroversial than a superficial statement that we should award victims ‘fair compensation’.

Similarly, it might be thought objectionable in this personal context to treat damages as if the issue were some question of exchange, with the defendant needing to offset the value of detriments caused by way of pursuing his advantage; as a variety of market exchange forced on the claimant by wrongdoing.⁶⁰ A full discussion of the commodification and objectification of persons is not possible here, but if, as has for example been argued in the context of property rights in excised bodily materials,⁶¹ the critical issue may be said to turn on whether there are advantages in the approach outweighing the detrimental effects of commodification generated in the particular case, then the ‘non-pecuniary loss as value’ approach might still be unsupportable given the conceptual mire it otherwise creates.⁶² If an alternative approach can be found which avoids this mire and does not raise the same commodification problem, it should be preferred.⁶³

Health Board [2000] 2 AC 59, 108, and for his own part at 111: ‘I agree...that the placing of a monetary value on the birth...is "as difficult and unrealistic as it is distasteful."’

⁵⁷ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.4 ff approvingly.

⁵⁸ Ibid at para 1.5, recognising consultees’ views at para 3.14.

⁵⁹ Rather than, for example, how they value themselves or on the basis of some objective dignitarian idea.

⁶⁰ Denied by e.g. CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-097, citing *Owen v Sykes* [1936] 1 KB 192.

⁶¹ See e.g. K Greasley, ‘Property Rights in the Human Body: Commodification and Objectification’ in Goold, I et al. (eds), *Persons, Parts and Property. How Should We Regulate Human Tissue in the 21st Century?* (Bloomsbury 2014)), in particular at 70 ff.

⁶² As outlined through the rest of this chapter.

⁶³ The approach outlined in chapters 3-6 does achieve this.

It is necessary briefly at this point to consider the potential to value non-pecuniary losses economically. Some argue that this is possible by means of such approaches as the statistical value of a life or willingness-to-pay, employing data on, for instance, risk-related insurance payments to consider how much value people actually attach to their non-pecuniary ‘commodities’. Those analyses maintain that this overcomes the difficulties noted here (for example, because they might look to a claimant’s own choices to value the claimant).⁶⁴ Leaving aside the conceptual difficulty with equating such figures with a sum a claimant would consent to pay or receive in place of certain goods or harms⁶⁵ (and equating this with the appropriate remedial response once the result has been wrongfully forced upon them⁶⁶), as well as the practical difficulties in conducting sufficient data collection to produce values for the full breadth of injuries, and assuming it is possible to overcome the effect of money’s marginal utility in making the calculation, there remains the fundamental difficulty discussed here. The falseness of being compelled to attach *value* on a singular and numerical scale to non-pecuniary losses is no less false or unilluminating because insurance companies or the public at large are placing the values rather than a court. The approach takes us no further than reliance on previous practice in the absence of conceptual foundation or on public sentiment; an analogy to the maligned older practice of jury-set awards is apposite.

These more abstract questions of value and of quantitative understanding are, then, the first and most obvious point of divergence between pecuniary and non-pecuniary losses, and precisely the point at which analyses of the latter disengage at the abstract level. It must also then be stressed that the immeasurability (and inestimability) of the non-

⁶⁴ See e.g. Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1 for an overview of a number of approaches and these and other difficulties attending them.

⁶⁵ At times seen as explicitly excluded: CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-097, citing *Owen v Sykes* [1936] 1 KB 192.

⁶⁶ It is easy to see a difference in principle between C commodifying her body or body products voluntarily and D doing so wrongfully – the wider issues are too broad for consideration here, but we can be clear that there is an artificiality in the idea that the statistical results represents figures a claimant would ever accept as the ‘values’ of her life or limb etc.

pecuniary heads represents a more practical difficulty with understanding and *identifying* non-pecuniary losses in quantitative terms. This difficulty bites deeper than simply the problem with damages *quantification* where it is generally raised.

If, for instance, we cannot on any sensible scale say *how much more* severe a loss is, even if we can, in taking two of a sufficiently similar kind or with an obvious disparity in severity, say which of them *is* more severe, then it is difficult usefully to talk about loss as a singular and continuous idea; rather it must be discrete and perhaps run on several scales – there is no unitary or objective gradation. It then seems false to try and map this onto a monetary scale (which must surely be why guidance in the form of general brackets for injuries, within which the eventual award should lie, is popular – placing the brackets and then how those brackets relate to each other is still a problem for the reasons discussed here). ‘Is (the use of) a thumb twice as valuable as (the use of) an index finger?’ is an unnatural question, but if we really are dealing with lost value we can happily both ask it and answer roughly yes.⁶⁷ To plot the values for such losses on this kind of singular, numerical scale implies a relationship which just cannot exist between them. This issue is all the more apparent when one compares (as the courts decline to⁶⁸) the sums with criminal injuries compensation or defamation awards: an extremely serious arm injury (just short of amputation) in negligence⁶⁹ would ‘equate’ to reputational damage for newspaper allegations that (inter alia) a claimant failed to make promised provision for her deceased husband’s family (roughly £90,000).⁷⁰ The isolation of negligence damages from such parallel regimes obscures, but does not solve the problem and ‘value’ seems to this extent untenable. It is also not enough to counter this by admitting that the exercise in placing

⁶⁷ Loss of an index figure c. £14,250 (£15,680 with uplift); thumb c. £27,000-£41,675 (£29,700-£45,840 with uplift) – Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 7.I.j and 7.I.u respectively.

⁶⁸ See chapter 1.IV.1.b.v.

⁶⁹ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 7.F.a) (p. 47).

⁷⁰ *Lisle-Mainwaring v Associated Newspapers* [2017] EWHC 543 (QBD) (ultimately discounted by 40% for an offer of amends made).

value is artificial;⁷¹ the issue is the implied relationship between awards (and thus between harms), which implication arises even with artificial value figures (which should all be equally artificial).

As just noted, even to go so far as to decide on relative severity between two losses requires substantial similarity of kind and/or wild divergence in severity, otherwise it becomes necessary to draw out a new set of (potentially quite subjective) ideas about which types are ‘worse’. Stevens, in recognising (as most do) that problems in comparing awards do arise (in the assessment context), notes as an example that ‘[t]here is no demonstrably correct valuation of an eye but we know it is worth more than an ear.’⁷² ‘Knowledge’ might seem strangely absolute. The claim can only ever be heavily contingent; a near-blind music fanatic might easily disagree and we have no solid guidance on the relevance of qualifying standards (in that last example, the interplay of objective and subjective ideas of value). With losses suffered only by experience, this issue can be particularly acute – different people have varying tolerance and can experience pain in different ways and at different intensities, even when caused by essentially identical injuries.⁷³ It is also, for example, clear on basic logic that losing a foot is less severe than losing a whole leg including foot and, biomechanically, that losing an opposable thumb is worse than losing any individual finger. However, whilst logically a bigger scar is worse than a smaller one, aesthetically a facial scar is worse than on the torso and biomechanically neither matters at all. The imposition of a value on loss as a matter of theory implies too absolute an expression of the detriment, which can only ever be more or

⁷¹ Cf. below on pragmatic blindness, II.4.

⁷² Robert Stevens, *Torts and Rights* (OUP 2007), 79.

⁷³ See e.g. *Manning v King’s College Hospital NHS Trust* [2008] EWHC 3008 (QBD) [41] (Stadlen J) and equally the definition of ‘pain’ given by the Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, para 2.10 (requiring a sensory experience). Cf. the definition in the taxonomy of the International Association for the Study of Pain (IASP) – available at <http://www.iasp-pain.org/Taxonomy?navItemNumber=576> (last accessed 30/11/2014) – emphasising subjectivity and past experience. Cf. also e.g. David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), para 3.21.

less vague, and nothing in the concept of loss as currently expressed can clarify the interplay and relevance of any number of conceivably significant factors.

Further, on the issue of subjectivity, the difficulty becomes particularly acute both conceptually and in terms of evidence – it simply does not appear to sit well with the conscience of the court for claims of personal subjective experience to allow claimants who have suffered the same wrong to recover significantly different sums where all else is equal, and subjective experience is understandably difficult to prove. To use Lord Pearce’s phraseology, why should the court encourage and respond to protestations of misery?⁷⁴ Or equally emphatically expressed in the literature: ‘The Christian and the stoic may take their injury calmly; another man may become excessively depressed and irritable with the identical injury’.⁷⁵ There is, of course, a tension here between this tenet and the demands of responding to the claimant specifically; how the claimant feels about scarring might seem, for instance, obviously relevant.⁷⁶ As we arrive at the tricky boundary between so-called (and ill-defined) ‘subjective’ and ‘objective’ elements of a damages analysis, the failure to categorise the sense and relevance of ‘subjectivity’ in the identification of loss causes problems.⁷⁷

The same is true for divergences of kind in the harm (or in its effects). Is it worse to lose your sense of taste or of smell? To lose a finger or suffer chronic fatigue syndrome? It seems hard to ‘know’ much beyond a rough-hewn ordering; the examples generally used are for physical injuries, but the issue only becomes more problematic when the full range of non-pecuniary losses is considered. Although the basic, practical utility for the courts of that rough basis cannot be denied – the courts have, after all, more or less successfully conducted the business of awarding non-pecuniary loss damages to this point – it must be

⁷⁴ *West v Shephard* [1964] AC 326, 369.

⁷⁵ A Samuels, ‘Damages in Personal Injury Cases’ (1968) 17 ICLQ 443, 468.

⁷⁶ See e.g. *Dimmock v Miles*, Unreported, 1969, extracted in David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), para 3.21.

⁷⁷ For further discussion of the objective/subjective loss ideas and the resolution to this issue on the new framework proposed in this thesis, see chapter 3.II.3, especially at b and c.

remembered that that operation has been conducted on the basis of individual judicial judgment and discretion with no more underlying structure than the idea of ‘worse off’. Usefulness can also be easily and needlessly overstated; as regards assessment, in *Atiyah’s Accidents* it is said that ‘widespread agreement could be achieved on the extreme outer limits’ and £100 and £1m for the loss of a hand are given as examples clearly too low and too high (more precision is a ‘matter of judgment’).⁷⁸ The present writer does not find that the best expression of the argument as to usefulness, but the explicit admission of the extent of the discretionary judgment within that is important. All of the questions about what is normatively important are hidden in that blunt discretion. Comparing losses will inevitably remain very difficult if the basis on which they are established to be a loss is unclear. Comparing two pecuniary values is straightforward – the issue is financial and X is worse off (financially) for having less money. There is no even remotely equivalent metric for non-pecuniary issues; we could not even crassly say ‘less body’ implies a harm, because whilst losing a finger might (and only might) be a harm, losing a tumour is (at least generally) not. In short, there needs to be more explicit recognition of the relevant senses of, or factors in isolating, detriment. Without this extra clarity in identification, discretion is broader and consistency harder to achieve.

Furthermore, as regards pain, suffering, or loss of amenity, our bodies do not behave in the same way as money holdings in terms of development and repair. A monetary position holds fast subject to intervention, whereas in terms of e.g. pain our position returns to a stable baseline. Once money is lost, the claimant’s position is worse until there is a specific corrective intervention, but pain wears off, injuries heal and unhappiness subsides (no matter the detriment suffered, reported levels of satisfaction/happiness return to a baseline level, a phenomenon termed ‘hedonic readjustment’⁷⁹). This potential for self-

⁷⁸ Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1.

⁷⁹ See e.g. Cass Sunstein, ‘Illusory Losses’ (2008) 37 J Legal Stud S157.

correction would further suggest the inaptness of monetary value to express or repair non-pecuniary loss. Without monetary value providing a convenient currency⁸⁰ to whitewash this temporal idiosyncrasy, we must accept that there is a normative difficulty in treating a present award as straightforwardly improving (correcting) a past, non-pecuniary harm. Once a claimant's pain has ceased, for example, she is in precisely the position relative to pain as she should be. Given that money can have no further impact on that pain or experience, its normative relevance as an apparent corrective would seem dubious, as discussed by Chapman.⁸¹ Under that author's strong corrective justice approach, the claimant's interests are understood to be heavily stratified and reparation requires that the benefit conferred must affect the particular interest in respect of which the claimant has suffered. Thus, if a claimant suffers pain, the law's response must directly engage that pain position. It is not, on that account, sufficient to confer general benefit on the claimant. Accepting Chapman's argument to that extent, if we are to impose a remedy, we need to identify a currency for non-pecuniary harm which would function in a way which does not present these difficulties – one by which the claimant's detriment would persist like a claimant's monetary position such that a present corrective could relate to the past incidence of harm, but without reducing our more important interests to monetary valuation and numerical scaling. Chapman, for his part, stresses the fundamental irreparability of non-pecuniary losses in this sense and deems it fatal to any substantial award in damages.⁸² The proposal to be developed in later chapters, however, does in fact allow all non-pecuniary loss to be seen in such a way that those losses persist, allowing a

⁸⁰ Cf. Victor Tadros, 'What Might Have Been' in Oberdiek, J (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014), 173 ff.

⁸¹ Bruce Chapman, 'Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice' in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995).

⁸² Ibid, 410 ff. See chapters 3, 4 for a solution which abandons any currency idea.

corrective measure to then engage them.⁸³ Pace Chapman, awarding substantial damages is then justifiable.

3. The relationship between heads of loss

Likewise important, and relatively little considered,⁸⁴ is the potential interrelation between the non-pecuniary and the pecuniary elements of an award. There is little judicial authority on the issue and there is a difficulty which again bites deeper than a simple quantification issue. As far as the issue has come before the courts, it has been dismissed in some quarters as practically of little significance,⁸⁵ but it should be noted that it is, firstly, at least significant as a matter of theory (which is our main concern at present) and, secondly, that the proper resolution to the abstract difficulties could have profound practical implications. The fundamental problem is that if pecuniary and non-pecuniary losses consist equally in a value diminution, they must be operating at the same level.

Most obviously relevant in this regard, and discussed at some length across the Atlantic, is the effect a physical incapability can have on the marginal utility of funds to the claimant. Though economists might question whether and to what extent such an effect is experienced, it certainly seems the case that the interrelationship between pecuniary and non-pecuniary losses is more complex than between simple pecuniary elements totalled and discounted; a fact not recognised in a conceptualisation where both are treated as the same and equally as value. Flipping the coin, there can be non-pecuniary consequences

⁸³ Cf. chapter 5.IV in re the solution proposed in this thesis.

⁸⁴ Mostly as the issue of overlap, centred on discussion of *Fletcher v Autocar Transporters* [1968] 2 QB 322, discussed below; see e.g. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.65 ff; Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-22.

⁸⁵ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.67, though note, *ibid*, paras 3.16 ff, the observations relating to loss of amenity and duplication with pecuniary loss (in particular the observations of Judge Grenfell at para 3.16, confirming reductions in non-pecuniary losses do sometimes occur in practice where duplication is feared).

alongside a pecuniary loss, but this is apparently never accounted – the reduced stress from now being incapable of a demanding and hated job in which one was trapped, for example, would be a doubtless impolitic parallel to an award for loss of congenial employment,⁸⁶ yet the same offsetting of benefit and burden does not seem to occur as with pecuniary losses.

Similarly, there is the broad question of substantive overlap in pecuniary and non-pecuniary awards, though doubt has been cast on whether there is such an effect.⁸⁷ Here we must consider in particular the arguments raised by the Law Commission⁸⁸ in dismissing the so-called *Fletcher* overlap, as they relate more generally to the issues raised. *Fletcher* was a case where the claimant had been injured in a car accident caused by the defendant's negligent driving. The Court of Appeal allowed an appeal on the damages sum, holding that there was overlap between the heads of damages awarded and allowing the defendant a deduction from the loss of earnings award for the costs associated with the claimant's hobbies (for which loss of amenity damages were claimed – the court would not presume that the claimant would have saved all of his earnings had he not been injured).⁸⁹ Contrary to the Court of Appeal in that case, the Law Commission maintains that the principle that the use a claimant will make of a damages award is irrelevant requires a court to ignore the cost of hobbies by way of a deduction. That would seem fine if the court did not make exactly those assumptions about the claimant's future conduct in making the amenity loss valuation. The issue is first and foremost one of consistency. Why should it be so that a claimant can benefit (in the sense of the award increasing) from the court presuming a future activity in the counterfactual (the continuation of a beloved hobby) without accounting for an *inseparable* cost (the hobby costs money)? Here we have a predictable

⁸⁶ Though some question whether that is a pecuniary or non-pecuniary loss – see e.g. *ibid*, para 3.20; CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-104. See also chapter 3.IV.3.

⁸⁷ See e.g. very prominently *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174, 190 ff (Lord Scarman).

⁸⁸ See Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.67.

⁸⁹ *Fletcher v Autocar Transporters* [1968] 2 QB 322.

outworking of a failure to engage openly with the differences between pecuniary and non-pecuniary losses; if all are equally value diminutions (as theory maintains), there must be offset. If they are different (as practice admits) then a new theoretical underpinning is needed.

The Commission further includes an argument that set-off should be made against the cost of substitute hobbies rather than loss of amenity or lost earnings, but again the finer points of categorisation of heads must be unconvincing where all losses are in theory equally value losses on the orthodox understanding. Finally, the argument is raised that such deductions treat the calculation as a precise exercise, as if it were pecuniary loss.⁹⁰ This is likewise insufficient. The deduction proposed in *Fletcher* is a decidedly pecuniary one (the cost of the hobby should be reasonably straightforwardly calculable) and even with non-pecuniary elements there is no more of a demand to calculate with precision than with any other loss. If importance is to be attached to an issue (here the hobby presumed in the counterfactual) then it seems only logical and just that the costs and benefits of it should weigh in the balance where all is equally value. The present conception of loss requires precisely this accounting; it is no answer to concede only at assessment that the true nature of non-pecuniary loss is fundamentally different from its pecuniary cousin.

4. Pragmatic blindness

In short, there are very important differences in the nature of pecuniary and non-pecuniary losses which are not accounted for in the dominant analysis, which essentially treats the two as identical on the basis of an abused compensation-driven analogy. In particular, we need to confront the problems associated with the use of an open loss concept; insistence

⁹⁰ See Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.65, noting (although without explicit endorsement) that the argument was proposed in the preceding Consultation Paper.

on the use of value or quantity more general; the unexplored normative ideas behind relevant factors; and the difficult construction of comparator scenarios against which to judge the value-differential.

There are, of course, many commentators and judges who are already explicit in recognising the difficulties with non-pecuniary loss discussed here (although most often this still finds expression in the secondary question of how to assess the value figure to be awarded, rather than the primary question of what a loss actually is). Having noted to greater or lesser extents that pecuniary and non-pecuniary heads are different, such authors recommit to orthodoxy by confirming that our present understanding rests on a form of pragmatic, wilful blindness to those differences. Tettenborn, for example, explains the practice in the following terms: It is unreal to regard ‘affectations of this sort’ as losses in the same sense;⁹¹ they cannot be valued or repaired by money, which can only ‘provide comfort or solace of a sort’.⁹² The law does, though, choose to ‘*regard* [them] as compensable in a rough-and-ready way’.⁹³ The thus-accepted compensation principle is then later stated in that work without the prior qualification that this is in the way of a fiction.⁹⁴ There is a notable honesty in Tettenborn describing the practice so: the compensation explanation is not an explanatory principle derived from practice or a worked-out theory subsequent to an idea of loss, but a desirable explanation prior to loss, extended from pecuniary losses purely for the theoretical convenience.⁹⁵ The impression given is of compensation for these harms as a variety of indulgence⁹⁶ and a more obvious

⁹¹ Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 1.36. For this reason and various others, Tettenborn himself favours abandoning a loss-based approach to damages entirely – see below, IV.4.

⁹² Ibid. On solace see below, IV.2 and chapter 5.VI.2.

⁹³ Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 1.36 (emphasis added). Elsewhere, Tettenborn damns the approach as ‘unsatisfying’ – ‘What is a Loss?’ in Neyers, JW, Chamberlain, E and Pitel, SGA (eds), *Emerging Issues in Tort Law* (Hart 2007), 455 – before outlining his solution; on which see below, IV.4.

⁹⁴ Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 29.01 ff.

⁹⁵ Cf. chapter 1.II.1..

⁹⁶ Cf. Reinhard Zimmermann, ‘Comparative Report’ in Winiger, B, Koziol H, Koch BA and Zimmermann, Z (eds), *Digest of European Tort Law. Vol. 2: Essential Cases on Damage* (de Gruyter 2011), 13/30 no 20, portraying rationales for such recovery as ‘somewhat helpless’, ‘speculative’ and ‘ultimately unconvincing’.

sign of the normative devaluation of non-financial harms than the reference to ‘affectations’ is hard to imagine. Much that same sort of pragmatism may be found in other commentaries, highlighting the artificiality of the association of loss in the non-pecuniary category with value: ‘In order to attempt to achieve restitution, which is the object of damages for personal injuries, a court must embark upon the *artificial* exercise of placing a financial value’⁹⁷ (again, we should note that this begins with the compensatory idea, and then also elides into assessment, because loss is accorded meaning only in value). The Law Commission has also approached such candour in the past.⁹⁸

This approach is not one limited to external commentators, and judges sometimes highlight the artificiality of the enterprise, too, albeit against a bedrock of declining to engage with the fundamental concepts broadly. Perhaps most prominently, the Court of Appeal in *Heil v Rankin*, in the course of its review of the assessment of non-pecuniary loss awards, explicitly declined to approach or reconsider the conceptual basis.⁹⁹ Romer LJ has noted, for example, that the court awards ‘what may fairly be described as notional or theoretical compensation’ because ‘actual compensation’ is not possible, and that ‘...the court in effect is being asked to measure the immeasurable, because, except with regard to financial loss, such as loss of earnings, damages cannot constitute actual compensation, whether £50,000 or £100 be awarded.’¹⁰⁰ These excerpts clarify yet again the extent to which there is a pre-existing commitment to compensation which is driving loyalty to monetary value and the counterfactual comparative notion of loss, rather than any self-standing analysis of loss, as well as highlight the abuse inflicted on ‘compensation’ to achieve the whitewash. If money must be given, and given as compensation, then value

⁹⁷ CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-92 (emphasis added), and note that restitution ‘cannot be given its literal meaning’ in personal injury cases – *ibid* at para 5-53.

⁹⁸ See Law Commission, *Personal Injury Litigation: Assessment of Damages* (1973) Law Com No 56, where the assessment of damages was considered to be devoid of principle, implying the same sort of difficulty at the more abstract level.

⁹⁹ [2001] Q.B. 272 [20] (Lord Woolf MR).

¹⁰⁰ *Rushton v National Coal Board* [1953] 1 QB 495, 502.

must be what is lost regardless of whether any of this is in any real sense true; for want of anything else it can do, the common law is said daily to achieve the impossible.¹⁰¹ This circularity, defining loss by working back from a response to loss, is fundamentally unsound; we must instead begin with an independent sense of what is bad in what has befallen the claimant and then find a way for a response to engage it.

As well as highlighting the tendency of the courts and commentators to begin with compensation (as a fig-leaf over pure pragmatism), again it is possible to see a blurring of the identification of loss with the assessment of a damages sum. This is an inevitable result of that same primacy of compensation— the abstract loss question becomes awkward and is leap-frogged in an effort to proceed to what is seen as the (only) important result, a particular monetary sum. Once again, all of the issues are spun on the assessment aspect; the problem is seen as a pragmatic question of arriving at a figure, not any issue driving deeper into loss itself. As an example, the ‘rough and ready compensability’ idea in *Tettenborn* and *Wilby* noted above can be seen to make little sense: as this chapter aims to show, conceptually non-pecuniary losses are simply not compensable on the current understandings. It is the assessment, a mode of isolating a sum generally acceptable as a damages award, which is ‘rough and ready’; however, this modus does not engage the nature of non-pecuniary loss or resolve its disjuncture with value replacement compensation. Goldberg has rightly noted some of these connections in reviewing historical shifts in the notions of fair and full compensation, arguing that neither ‘fair’ nor ‘full’ compensation is inherent in the structure of tort law.¹⁰² He rests on ‘injury’ (in

¹⁰¹ See Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), para 1.18; David Kemp and Peter Mantle, *Damages for Personal Injury and Death* (7th edn, Sweet & Maxwell 1998), paras 3.1 ff (non-pecuniary losses ‘cannot as such be eliminated or ameliorated’ but the objective remains the same despite being difficult conceptually). Cf. Birkett LJ in *Rushton v National Coal Board* [1953] 1 QB 495, 501: ‘If money is no compensation, then £5,000 ... or £20,000 become meaningless, but the courts have been compelled by the logic of circumstances to decree that ... the only thing open to the court is to make an award of damages in money.’

¹⁰² John Goldberg, ‘Two Conceptions of Tort Damages: Fair v Full Compensation’ (2005-2006) 55 DePaul LR 435.

whatever incarnation) being analytically prior to compensation, but we can go further and consider if compensation is inherent. Goldberg automatically overlays compensation on an injury idea, importing pecuniary structures and value, instead of working from an honest and coherent loss idea to a proper sense of what response can be made.

The question remains, in any event, whether the reverse-engineered loss idea we have inherited (broad, discretion-driven, value-based and loosely identified from counterfactual comparison) can really be supported or represents the best conceptual structure to deploy where the losses remain, in fact if not in (the dominant) theory, very different. The current orthodoxy is not an account of damages practice which can be consistent with a convincing doctrinal basis for loss. Understood in so intuitive a sense, it is too fluid to provide any guidance, encouraging broad judicial discretion or at best demoting significant abstract problems to operational, assessment concerns. Given the foregoing, it should also be obvious that there is a pervasive problem with the normative weight accorded to non-pecuniary loss. Going some way to concede the importance of the interests at issue, McGregor suggests that money is awarded ‘as a substitute for that which is generally more important’.¹⁰³ ‘Substitution’ is untechnical (and might be a source of confusion¹⁰⁴), and there is at least a heavy dose of irony. Recovery for non-pecuniary losses is often questioned, with an overriding concern to keep awards within bounds seen as reasonable and there have been various attempts to abandon them entirely.¹⁰⁵ Some explicitly place them below pecuniary losses in a hierarchy of recoveries.¹⁰⁶ Where assessment is acknowledged to be arbitrary and artificial, and all else is condensed to it, then of course the critical emphasis on these most important of detriments being wrongfully imposed is

¹⁰³ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001.

¹⁰⁴ Contrast, for example, the different sense in which Stevens deploys the term – see Robert Stevens, *Torts and Rights* (OUP 2007), 59 ff – for a form of damages given in place of the claimant’s infringed right itself.

¹⁰⁵ Cf. chapter 1.I and Introduction.

¹⁰⁶ See, e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-65, where (in discussing the seemingly anomalous recovery in wrongful birth cases), it is said that ‘[t]o place non-pecuniary loss above pecuniary loss is certainly odd.’

lost. Where everything is understood in value, meanwhile, defining features of the detriment are lost and a drive to increase sums becomes inevitable – claimants will never be satisfied that the value of their harm equates to the resultant, ‘reasonable’ awards.¹⁰⁷

III. The practical identification and particularisation of losses

1. Injury and effect

Having reconsidered the value-centred, state-based comparative framework used to identify loss, it is also useful to analyse the practical application of those ideas to illustrate the depth of the problems; how does a claimant know what to claim for? To begin with the question of what issues define the claimant’s position, it should be recalled that chapter one highlighted a common consensus centred on the effects of injuries. However, the exact boundary line is controversial, there is clearly some reliance in practice on injuries and we will soon see that effects are practically problematic.¹⁰⁸ Equally, although much of the difference made when comparing the claimant’s situation and the (temporal or) counterfactual alternative would be a facet of use or function rather than integrity, it seems clear that the two are, conceptually, equals in terms of capacity to represent objects of change in value between states. Though it was said before that *inter alia* Ogus refuses to acknowledge it as correct to attach value to integrity,¹⁰⁹ it might be doubted nevertheless whether attaching value to use, function, or happiness is any less problematic, given the criticisms of quantitative identification outlined above.

¹⁰⁷ Cf. e.g. C Neale, ‘Cannibalism in the legal sector’ (2015) 159 (12) *Solicitors Journal* 29, attributing increasing claims against solicitors for negligent undersettlement to unreasonable, high expectations on the part of claimants as regards damages values.

¹⁰⁸ See chapter 1.III.1. and, on effects, immediately below, including especially III.2.

¹⁰⁹ See chapter 1.III.1 and e.g. A Ogus, ‘Damages for Lost Amenities: for a Foot, a Feeling or a function?’ (1972) 35 *MLR* 1.

In terms of accommodating an apparent primacy of effects into the conceptual structure, meanwhile, for those defining loss simply in terms of compensation (and then thus with a counterfactual comparison), focusing on effects requires only a relatively minor qualification at first blush – effects are seen as having value where injuries per se do not (though that stands or falls by the valuation reasoning). For Cane and those who define loss around an intermediate idea of being ‘worse off’, the issue is trickier insofar as it becomes (even) less intuitively correct to maintain that an injury ipse is excluded or even conceptually less important. To give a particular example, it was seen that varieties of injury (e.g. loss of a leg) fall under Cane’s core sense of loss, whilst the effects would fall under his outer penumbra of harm and damage;¹¹⁰ the implication would be that injuries themselves, as more central loss ideas, should be accorded more weight. Again, in this sense Cane’s archetype of loss appears more expansive without giving any real guidance on its limits and reasoning; the injury itself and the way it changes the claimant’s life both leave the claimant worse off in a sense, but the senses are different and which senses matter is not clarified. Commentators like Ogus capture a more specific sense of detriment (by excluding integrity in favour of use and function). However, as just discussed that division itself might not stand up to scrutiny and in any event it conflicts with the prominence of integrity ideas intuitively and in practice. An integrity loss which causes no functional detrimental will concern a claimant less, but not so little as to be negligible.

It might seem, then, that it is preferable to acknowledge a conceptual role for both integrity and use/function ideas. Any difference might then be a purely practical question of which of the two features more frequently or prominently in practice.¹¹¹ The conceptual commitment to identifying loss (in whole or part) in terms of effects is more fundamentally problematic, however, insofar as this understanding still places no useful boundaries on

¹¹⁰ See the outline at chapter 1.II.2; Peter Cane, *The Anatomy of Tort Law* (Hart 1997), 103 f.

¹¹¹ Cf. e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-56; CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5.93.

effects. This section will focus on this residual impracticality of delineating particular effects as losses.

2. Arbitrary identification

The delineation of the injuries and/or effects suffered by the claimant is an important aspect of the remedial process at the very least insofar as it is how the difference between the claimant's actual and counterfactual states is understood, as we saw in chapter one.¹¹²

It should therefore be possible to produce a breakdown of the bad which has befallen the claimant from the dominant understanding of loss as outlined thus far. However, if the point of listing injuries/effects is to outline each of the individual losses suffered then no attempt will ever be likely to succeed. If we give no more definition to loss than to say that diminished value is recoverable and the effects of injury represent value then all effects are in theory equally deserving. The practical issue of which effects appear to matter more to the court, the claimant or her lawyers at the point of claim should not bear upon identification, but the task of identifying losses is then worthy of Sisyphus. How, for example, can someone even begin to delineate the ways in which the life of a claimant rendered quadriplegic by an accident is altered (for the worse) by that quadriplegia? Our lives and activities are so variable and so susceptible to change that even the dullest claimant would fail to express fully what is different about her life after suffering a wrong. Likewise, how can a claimant foresee inevitable changes in her priorities as regards her detriment?¹¹³ The attempt to award compensatory damages here has become impossible in two senses; not only can actual restoration not be achieved in any proper sense with these harms, but a true or non-arbitrary list of those losses which are to be compensated cannot

¹¹² See chapter 1.III.1.

¹¹³ See e.g. *Tait v Gloucestershire* [2015] EWHC 848 (QBD) [56] (McKenna J): 'plainly, over time, her focus would have changed'.

be completed in the first place. The result on the current approach seems necessarily to produce only a very flawed approximation.

By contrast, if one were instead to suggest as a counterargument that the aim of the statement of claim could be viewed as intended only to indicate a general sense of the extent of the harm and its severity, then still the full number of effects is at least equally as worthy and informative as a demonstration of a number of effects which happen to be seen as most severe by the claimant,¹¹⁴ or in fact happen to be thought of at all (and so appear in the statement of claim). There is again, moreover, a problem in the potential for the effects experienced and their perceived severity to vary over time. Attempting a limited expression of the scope of loss is for these reasons entirely unconvincing as a proxy for understanding the impact of wrongdoing on a claimant. The data provided will necessarily be partial (a complete delineation of all of the effects and limitations of an injury being impossible), subjectively informed, and potentially always subject to very significant change. It is consequently concluded that this is an essentially arbitrary attempt to provide information for the damages enquiry.¹¹⁵

The solution in practice, of course, is more straightforward. In practical terms losses are very often dealt with in terms of the actual injury (and some consideration of key effects), rather than simply in effects.¹¹⁶ This use of injury as a proxy offers very concise expression of detriments – to return to the example above, the quadriplegic claimant suffers quadriplegia – and channels our thinking into manageable categories in a way which is practically indispensable. Moreover, some categories of non-pecuniary loss are straightforwardly not treated as raising any question of effects, the clearest example being awards for loss of reproductive autonomy, which appears as a uniform idea without any

¹¹⁴ Or her lawyers, or the judge.

¹¹⁵ Cf. the criticism of comparative state-based accounting above, II.1. Not only can we not choose non-arbitrary points to structure a comparison, we cannot complete a true description of the full difference between the positions, whichever two are chosen.

¹¹⁶ See chapter 1.III.1.

concern over the precise effects or life changes felt by particular claimant parents.¹¹⁷ Focusing on injury alone instead of effects would therefore seem to produce a more uniform approach.

The relationship between injury and effects is thus fundamentally difficult. The entire basis for focusing on effects at the conceptual level is that the compensatory comparative account requires us to respond to the difference made to the claimant's life, where injury is insufficiently precisely correlated with that difference. One claimant might place great reliance on her legs and injury to them is devastating, where the more sedentary claimant would be less disturbed – Ogus outlines the point very clearly.¹¹⁸ In practice injury must be used, however, to have any hope of manageable expression where effects are too numerous, varied and nebulous. This leaves us with a theoretical framework for non-pecuniary loss which is so loosely defined and expansive that it is practically unhelpful, and an approach to those losses in practice which is inherently flawed in theory.

3. Social and cultural inputs

It seems, then, that the presentation of identified losses might in part be arbitrary, or at least guided by undisclosed (and perhaps subconscious) reasoning; the effect of the latter is bound to be disguised where a wide discretion is at issue. An important example of the phenomenon which may be mentioned here is social and cultural influences. The judiciary are certainly alive in principle to the need to counteract the vagaries of their own individual preferences, as made clear in the observation of Lord Diplock, addressing non-pecuniary loss damages, that: '...if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the

¹¹⁷ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 [18] (Lord Nicholls), [8] (Lord Bingham).

¹¹⁸ A Ogus, 'Damages for Lost Amenities: for a Foot, a Feeling or a function?' (1972) 35 MLR 1, 6 ff, 11.

figure must be “basically a conventional figure...”¹¹⁹ The impact of idiosyncrasies can be subtle, though, and they are not solely related to the judge or jury, or to the eventual size of award. They can also relate to claimants and solicitors, for example, and affect which losses are discussed in the first place. Any deviation from a truly objective description of detriment to the claimant risks subjectivity, variability and inconsistency in damages practice. Again, non-pecuniary harms differ considerably from pecuniary harms in this respect. Whilst for future pecuniary harm there is some quantification guesswork involved, for non-pecuniary harm the quantification dilemma is more acutely rendered and sits atop the more fundamental question of whether and what type of ‘loss’ there is in the first place. As noted above, with money that question is fundamentally mathematical; with personal harms it is clearly not. Various participants in the claims process, and indeed many outside, can produce an impact on how loss is determined beyond the open effect-focused framework – the judge, lawyers, the claimant, expert witnesses, or just prevailing social perceptions.¹²⁰

Some aspects of cultural impact can be seen by comparing loss ideas across systems or eras. Bloom places particular emphasis in her overview of cultural influences on work analysing Medieval and barbarian laws and an analysis between different cultures.¹²¹ Examples include that some cultures assigned different values to different fingers, based on a particular usage,¹²² or that there was a declining emphasis on the victim’s status in damages awards in Medieval England.¹²³ Perhaps the most immediately obvious example might be the declining importance of bodily functions or appendages central to martial performance: an ‘index’ finger was of lower relative importance amongst fingers (and attracted lower composition payments) in post-Conquest codes than it had been as the

¹¹⁹ *Wright v British Railways Board* [1983] 2 AC 733, 777.

¹²⁰ See e.g. Anne Bloom, ‘Plastic Injuries’ (2014) 42 *Hofstra L Rev* 759, 762.

¹²¹ *Ibid*, 788 ff.

¹²² *Ibid*, 790.

¹²³ *Ibid*, 789. Cf. the position in earlier English legal codes – see e.g. Benjamin Thorpe, *Ancient Laws and Institutes of England* (1840), w.g. [wer-gylde], R. [ranks].

‘shooting’ finger earlier.¹²⁴ Not least the change in designation (and associated shift in understanding) makes it clear that this issue goes to the understanding of the loss, not simply the assessment of a remedial sum.

Other forms of cultural bias operate to distinguish harms as they apply, for example, to particular persons within a society in a particular period; they affect not so much our perceptions of the relative importance of harms or ‘losses’ inter se, but rather show the flexibility in the basic identification of a variety of fact as a ‘loss’, its inclusion in a claim and/or the severity ascribed to it. This can be said to apply to the issues of status mentioned above – an identical bodily harm might only be seen as loss when its existence or infliction contravenes social status norms¹²⁵ – or in broader cultural ideas about whether it is appropriate for groups to make a claim for a given fact at all.¹²⁶ Perhaps the best expression of this involves gender; as an all but unrecognised factor guiding our sense of non-pecuniary loss, it will serve as just one important example here.¹²⁷ It can influence our sense of loss both in the identification as loss per se, the relative prominence of losses in a claim and their severity: ‘[G]endered assumptions’, per Graycar, ‘can affect both decisions about what activities or abilities count for the purpose of measuring impairment and the practical application of those principles’.¹²⁸

As an initial historical example of gender’s significance (albeit from an action under an insurance contract), Pollock CB gave his personal view that, although a jury has the

¹²⁴ See *ibid*, Aethelb. §54 and Alfred §56-60 (shooting); W.I.XI and Hen I XCIII §§ 15 ff (index).

¹²⁵ Cf. undercurrents of protection against contumelious behaviour in other torts – Ibbetson, below n 175. For a more distant context, cf. e.g. Dirk Eilers, *Codex Hammurabi. Die Gesetzesstele Hammurabis* (Marix Verlag 2009), e.g. §§ 200, 201 (knocking out a subordinate’s tooth costs 1/3 silver mina, that of an equal the assailant’s own tooth – some losses require not just different sums but different remedies).

¹²⁶ See e.g. Carl F Bayerschmidt and Lee M Hollander (trans), *Njáls Saga* (Wordsworth 1998), xxx (Introduction), 317 f – Hall of Sida’s declining to seek recompense for the death of his son is itself shameful in Medieval Iceland; cf. Aristotle’s vice of *meionexia* (insofar as it is a departure from the just balance, taking less than one’s entitlement is an injustice; Nichomachean Ethics bk 5, 1129b7-10, 14) and contrast Pollock CB’s distaste for non-pecuniary loss immediately below.

¹²⁷ There is insufficient space in this thesis to give a fuller analysis of gender in this context, or indeed any number of other social or cultural determinants.

¹²⁸ Reg Graycar, ‘Sex, golf and stereotypes: measuring, valuing and imagining the body in court’ (2002) 10 Torts LJ 205, 208. Although not discussed here in particular, the plastic surgery-centred issues of cultural perception raised by Bloom are, by her own assessment, particularly relevant to women – ‘Plastic Injuries’ (2014) 42 Hofstra L Rev 759, 765 ff.

right to award non-pecuniary loss damages, it is ‘an unmanly thing’ to make a claim in respect of negligently inflicted bodily suffering, which is ‘part of the ills of life, of which every man ought to take his share’ (and, in fact, that it is not a means of compensation, but of punishment).¹²⁹ As well as providing evidence in another context of general suspicion (scorn) of non-pecuniary items of recovery, the suggestion is clear that, at least historically, the question of whether a ‘loss’ exists, whether there is a right to ‘compensation’, and the raising of a loss in a claim can turn on broader concerns. A similar idea might be seen in modern references to the idea of reluctance to discuss intimate symptoms¹³⁰ – shame can be important and we might consider if a loss framework should better serve to limit the impact of that.

An obvious modern point to start would be the divergence in the level of awards for scarring between men and women, the perception apparently persisting that disfigurement is just more serious when suffered by women, as reflected in award figures.¹³¹ Following the current Judicial College figures, a man might expect up to £55,000 for ‘very severe scarring’ to the face,¹³² a woman as much as £81,400.¹³³ The compilers comment critically on the distinction in the introduction to that section (though they maintain it in the listings whilst it represents current practice¹³⁴), doubting whether gender is a proper or lawful factor when assessing damages. Immediately, though, this is qualified: ‘That is not to say that factors which inform the appropriate level...may not arise more commonly, or with more general potency, in the case of one gender rather than another.’¹³⁵ The result sits, in particular, uneasily next to the idea that the nuances of subjective experience should

¹²⁹ *Theobald v Railway Passengers Assurance Co* (1854) 26 Eng. L. & Eq. R. 432, 438. The interjection does not appear in the English Reports – (1854) 10 Exch. 45, 156 E.R. 349.

¹³⁰ See e.g. *Tait v Gloucestershire* [2015] EWHC 848 (QBD) [56] (McKenna J).

¹³¹ Cf. the brief note made on gender as an assessment factor in Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-079.

¹³² Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 9.B.b.(i) (p 82)

¹³³ *Ibid*, 9.B.a.(i) (p 81).

¹³⁴ See *ibid*, 9 (p 77): ‘The Guideline has retained the “female” and “male” sections because that is the historical approach. We await a judicial decision synthesising the two.’

¹³⁵ *Ibid*.

be irrelevant,¹³⁶ at least if the gender discrepancy is to be seen as the result of a tendency of female claimants to take more cognisance of scarring (i.e. experience more suffering – this appears to be in large part what the Judicial College’s qualification above suggests¹³⁷). If, meanwhile and by contrast, it is to be seen as a social judgment that scarring on a woman is simply objectively a more severe injury than a scar on a man, then that is itself controversial and would seem to deserve some discussion, whereas it now simply emerges from quantification decisions.

The same sort of divergence can be seen in awards for injuries to the reproductive system. The Guidelines separate male and female sections, though without in this context questioning the propriety of that divergence in practice.¹³⁸ This is understandable to an extent – anatomical differences are hard to miss – but the framework within those sections shows divergences in practice which cannot be justified on that basis. For men, we begin with ‘total loss of reproductive organs’ (unusually an award with no upper bound listed¹³⁹) and then impotence, followed by five brackets for degrees of sterility.¹⁴⁰ For women there is no award included for loss of reproductive organs (total or partial)¹⁴¹ and the guide proceeds straight to three degrees of infertility before concluding with failed sterilisation leading to unwanted pregnancy (the latter having no equivalent in the male section for failed sterilisation of a man, which is of course not an unknown phenomenon¹⁴²).

¹³⁶ Above, II.2. See *West v Shephard* [1964] AC 326, 369 (Lord Pearce); A Samuels, ‘Damages in Personal Injury Cases’ (1968) 17 ICLQ 443, 468.

¹³⁷ The factors informing the level listed are the nature of the underlying injury; the nature of treatment; the nature of residual scarring; the claimant’s age; and the psychological and subjective (including the effects on social, domestic and work life) impacts on the claimant – Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 9.B (p 80). Only the latter impacts would seem apt to be responsive to gender.

¹³⁸ Ibid, 6.E and 6.F (p 28 ff).

¹³⁹ ‘In excess of £128,700’ – ibid, 6.E.a (p 28).

¹⁴⁰ Ibid, 6.E.(a)-(f) (p 28 f).

¹⁴¹ Cf. e.g. *Briody v St. Helen’s & Knowsley Health Authority* [2000] PIQR Q165 – a case involving a hysterectomy where the focus is very much on infertility and PTSD.

¹⁴² Consider *McFarlane v Tayside Health Board* [2000] 2 AC 59 (failed vasectomy). There is no reason why the fact that the male patient himself will not become pregnant would render a negligent, failed sterilisation less of a loss, especially when several thousand pounds is given for sterility that ‘amounts to little more than an “insult”’ – Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP

Whilst it must again be stressed that the Guidelines are not a normative, but a descriptive framework for damages, it is still important that the damages cases used as their basis are seen to divide in these ways, and that this passes without comment. This is an interesting complement to evidence suggesting inter alia that, in terms of sexual pleasure and the importance of reproductive organs beyond fertility, women's experiences might be underrepresented compared to men's. An analysis of Australian jurisprudence by Graycar and Cronin suggests this is true for the selection and description of losses.¹⁴³ During the course of an analysis of approximately 3,000 cases, they identified certain trends pertinent to the present discussion. Most pressingly, it is, in Graycar's words, 'easier to find references to women getting pleasure and satisfaction from housework than it is to find references to sexual pleasure'¹⁴⁴ (indeed, 'for some judges, sex for women and housework are also pretty much the same thing'¹⁴⁵). The suggestion apparently borne out by the case analysis is that, beyond the issue of whether women do more housework and the extent to which that may be claimed as a loss, intuitions to that effect and the supposed predominant importance of that loss squeeze out other losses from claims by female claimants.¹⁴⁶ Although that analysis was conducted in Australia, there seems little reason to doubt, in light of the foregoing, that a similar trend might not exist in English decisions.

In many of these situations, it seems that whilst men and women can suffer equivalent detriments the eventual presentation, and by extension the loss identification and damages assessment conclusions, in the legal process can differ considerably on the basis of cultural ideas concerning their existence, severity or importance. It might seem, then, that the

2015), 6.E.(f) (p 29). Cf. *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 [124] (Lord Millett): the award could be made to a father.

¹⁴³ See Reg Graycar, 'Sex, golf and stereotypes: measuring, valuing and imagining the body in court' (2002) 10 Torts LJ 205, 209 ff, 214 ff, and particularly 211.

¹⁴⁴ Ibid, 207. (Though even for men the joy of sex is, so to say, a relative novelty – loss of reproductive function was the sole focus previously: see e.g. Benjamin Thorpe, *Ancient Laws and Institutes of England* (1840), Alf. 65 '...so severely wounded in the genitals that he cannot beget a child'; Hen I XCIII §24).

¹⁴⁵ Reg Graycar, 'Sex, golf and stereotypes: measuring, valuing and imagining the body in court' (2002) 10 Torts LJ 205, 208.

¹⁴⁶ The piece goes on to consider the consistent devaluation of women's bodies and the contrasting level of attention paid to male organs – ibid, 209 ff.

presentation of loss, where not merely arbitrary, may be guided by much more than would seem to be admitted, and guided less than might be hoped by any coherent loss idea. There is normative reasoning involved in the presentation and identification of loss as such, and a loss concept should aid in drawing out and adjudicating on these issues rather than allow them to be lost in a nebulous mist of discretion.

IV. Existing challenges to the value-diminution orthodoxy

Having thus established a number of critical problems underlying the approach currently taken to the recovery of non-pecuniary loss damages, especially as regards the identification of loss itself, it is necessary to turn again to alternative perspectives. As has been noted already, there are a number of prominent challenges to the orthodoxy despite the courts having repeatedly and clearly rejected the contention that recovery for non-pecuniary losses in negligence is grounded in anything other than compensation for value-loss.¹⁴⁷ Before any new attempt can be made to resolve the loss problems, it is necessary to consider whether these existing frameworks have already done so, and why or why not.

1. Nothing

It was noted above that various approaches deny recovery entirely on the basis that the practice is pointless or expensive. A third, ‘no-award’ category is also relevant – certain economic, and often indemnification-focused, analyses of this area achieve the same result by a redefinition of ‘loss’; if loss is a purely economic idea, ‘non-pecuniary loss’ is a

¹⁴⁷ See in particular *Heil v Rankin* [2001] QB 272.

contradiction in terms. Incurring a non-pecuniary harm does not impact the claimant's financial position, nor even necessarily alter the marginal utility of funds to her.¹⁴⁸

To make no award because nothing relevant is lost clearly does not represent a practice acceptable to the English courts or the most fundamental of our damages intuitions, even if it has the clear advantage of providing defined boundaries. Rather than brave the conceptual mire surrounding attempts to value the priceless, a bright-line rule denying recovery seems to present a straightforward, non-arbitrary position, replacing only what can be replaced and only with something apt to replace it. However, we are concerned with losses which are seen to require redress and relate to our more important interests – the courts, Law Commission and the public are rightly committed to recovery.

2. Happiness

A particularly long-lived alternative analysis (mentioned already¹⁴⁹) posits that non-pecuniary losses fall under one umbrella; 'happiness' is what is lost, whether the claimant experiences pain or can no longer play a beloved sport. The concept has resurfaced time and again in an attempt to rationalise the wilderness of non-pecuniary losses, despite the courts repeatedly adopting positions contrary to it. The Law Commission stoked the fire relatively recently by proposing the adoption of a 'happiness' approach in its consultation

¹⁴⁸ See e.g. Bruce Chapman, 'Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice' in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995), 410 (with further references), S Croley and J Hanson, 'The Non-Pecuniary Costs of Accidents: pain-and-suffering damages in tort law' (1995) 108 Harv L Rev 1785, Louis Visscher, 'Tort Damages' in Faure, M (ed), *Encyclopedia of Law & Economics* (Edward Elgar 2008) (at part 6); indeed, some conclude the impact on marginal utility is such that a zero-sum award still represents too much of a monetary payment. For criticism of this and such no-loss approaches generally see e.g. Essert, 'Tort Law and Happiness' (2010) 36 Queen's LJ 1.

¹⁴⁹ See chapter 1.III.2.

paper on non-pecuniary loss damages.¹⁵⁰ It retracted the recommendation for the final report following critical consultation responses.¹⁵¹

The approach, as suggested, is seen to have the advantage of unifying the heads of non-pecuniary loss under one idea; a hedonic impact on the claimant. A focus on all non-pecuniary loss as a question of distress is a popular idea across many legal systems.¹⁵² Its potential to unify the loss concept, however, is not limitless. Whilst certainly true of the traditional core of non-pecuniary losses – e.g. pain and suffering, injury-related loss of amenity – it might be doubted for others. In wrongful birth cases, for example, much difficulty relates to the view that the child itself is a net blessing and source of joy,¹⁵³ and with psychiatric harms it would be odd to compensate a claimant for being ‘unhappy’ if she is clinically depressed and has been required to prove clinical depression to recover at all.¹⁵⁴ Another very significant result (and detriment) of adopting the approach (noted in chapter one) is perhaps the most significant area of contention: an unconscious claimant could not recover for non-pecuniary losses understood on this basis. Such a result has been repeatedly rejected by the courts at the highest levels¹⁵⁵ and would strike a very strange chord for any layman. The Law Commission has likewise recently accepted the importance of allowing recovery in those circumstances.¹⁵⁶ In some quarters this may be seen as too

¹⁵⁰ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.5 ff. See also e.g. Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), who remains an advocate.

¹⁵¹ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.8-2.24.

¹⁵² See C Stolker, ‘The unconscious plaintiff: consciousness as a prerequisite for compensation for non-pecuniary loss’ (1990) 39 ICLQ 82.

¹⁵³ See *McFarlane v Tayside Health Board* [2000] 2 AC 59, 113 f (Lord Millet): ‘...the law must take the birth...to be a blessing...It brings joy and sorrow...But society itself must regard the balance as beneficial.’

¹⁵⁴ A diagnosed psychiatric condition is required to establish liability, see *Hinz v Berry* [1970] 2 QB 40.

¹⁵⁵ See most recently *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174.

¹⁵⁶ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.8-2.24.

generous and driven by sentimentality,¹⁵⁷ but the intuition is too well entrenched now and should, it is argued, be respected.

Further, though, where subjectivity proved a problem above, the same must apply *a fortiori* if the award rests on a more (entirely?) subjective basis, and the courts face a very difficult hurdle in attempting to understanding the impact of unfortunate events on claimants in front of them whose experiences they cannot share. Psychological research would suggest the tendency of those attempting to assess the hedonic impact of any particular setback to overstate it and neglect to consider so-called hedonic readjustment.¹⁵⁸ There also remain further difficulties in explaining an award in terms of lost happiness – in particular, the same problems associated with the very different nature of non-pecuniary harms from pecuniary losses discussed above: happiness no more lends itself to valuation, numerical scaling or repair than do the personal harms otherwise described. Happiness is one facet present with many of these losses, but not all, and they remain in essence the same troublesome creatures.

A seemingly similar view posits that damages are awarded by way of solatium to the claimant (without necessarily suggesting that the loss requiring redress itself is of happiness – solace is an adjunct or alternative to compensation, not value-loss). Despite strong opposition from the courts and other commentators,¹⁵⁹ traces of this view can still be found in common practitioners' works.¹⁶⁰ Given that it presents as a supplement or alternative to *compensation* without entailing any engagement with the loss problems at the heart of this discussion, the idea of a solatium must be considered later.¹⁶¹ A further

¹⁵⁷ Reinhard Zimmerman, 'Comparative Report' in Winiger, B, Koziol H, Koch BA and Zimmermann, Z (eds), *Digest of European Tort Law. Vol. 2: Essential Cases on Damage* (de Gruyter 2011), 13/30 no 20; it is also made clear there that recovery here has strong support across Europe.

¹⁵⁸ See Cass Sunstein, 'Illusory Losses' (2008) 37 J Legal Stud S157.

¹⁵⁹ See very explicitly e.g. Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), paras 2.20, 6.2 (relying on *West v Shephard* [1964] AC 326).

¹⁶⁰ Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-07. A more tentative acknowledgement of a likeness to solace payments can be found in Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 1.36.

¹⁶¹ Amongst objectives of the assessment of damages enquiry; see chapter 5, especially 5.VI.2.

variant, though, is the so-called functional approach, favoured in Canada and preferred by Ogus, whereby the enquiry introduces happiness derived from substitute pleasures into the assessment melting pot.¹⁶² Happiness is what is considered lost but, rather than attempt a valuation of this loss, the claimant will recover for the costs associated with undertaking activities from which equivalent pleasure can be derived.¹⁶³ As a consequence, several of the (assessment) difficulties mentioned above are avoided – happiness need only be equated with other happiness and there is a market giving the values for undertaking the activities. Difficulties remain, though, in measuring happiness, especially when experienced very variably, and certain recoveries are still inconsistent with happiness lying at root. There is also a high level of remove between the relief (as the cost of an activity proposed to be undertaken [intended] to provide happiness of a level equivalent to that lost via the wrongful injury) and the wrongful injury itself. Moreover, it is submitted that there is difficulty in the underlying proposition that one experience of happiness ‘repairs’ a past experience of unhappiness. Given the readjustment phenomenon and the completeness of past unhappiness, discussed at more length above, the proposition cannot be supported. Such a response also seems, therefore, to be normatively irrelevant.¹⁶⁴

3. Happiness and loss selection

Considering the functionality of a happiness basis for understanding non-pecuniary losses, we must also consider again the selection and identification of losses in a claim. It is important to find a framework by which arbitrariness and bias in that process can be understood (and reduced), and by which the normative ideas underlying that process can be

¹⁶² See e.g. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 2.4; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-069; A Ogus, ‘Damages for Lost Amenities: for a Foot, a Feeling or a function?’ (1972) 35 MLR 1.

¹⁶³ For a summary explanation, see *ibid*, 3.

¹⁶⁴ See also Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, paras 2.5 f for a number of other, more practical concerns which led to their rejection of the method.

drawn out. The framework proposed later in this thesis does so. By contrast, in addition to the problematic conceptual content of such a standard, it is clear that happiness is insufficient to resolve any of the selection/identification problems which plague 'effects', because, although hedonic impact is common across many instances of non-pecuniary loss, not all instances of unhappiness represent recoverable losses (in particular, what are termed ordinary emotions are not recoverable, including grief¹⁶⁵). Happiness can thus only ever represent a partial explanation of loss at best and the framework is in need of some basis by which to distinguish some instances of unhappiness from others.

It would therefore seem that happiness would need to function as an adjunct to the injuries and effects framework discussed. The result would potentially resolve some of the identification issues; the combination of hedonic impact and (effects of) injury would narrow the canon of recoverable losses to something recognisable (though the recovery of unconscious claimants, for example, would remain a sticking point) and explain in part why it might matter how important the particular injury or effect seems to the claimant at the point when the claim is formulated and assessed.¹⁶⁶ Nevertheless, this progress is achieved at the expense of introducing the additional conceptual difficulties noted above, on top of the conceptual problems in a comparative state-based account.

New and exacerbated identification and selection problems are introduced, meanwhile, in the case of a functional assessment of damages, whereby awards for non-pecuniary losses are evaluated on the basis of the cost of substitute pleasures. An essential difficulty for the functionalist lies in the fact that there is no inherent relationship between the level of happiness achieved and the cost of undertaking the activity which provides it. In the (slightly crass) words of Lord Pearce, '[t]he cripple by the fireside reading...may achieve

¹⁶⁵ See e.g. *McLoughlin v O'Brian* [1983] 1 AC 410, 431 (Lord Bridge).

¹⁶⁶ Cf. above III.2.

happiness as great as that which...he would have achieved playing golf...' ¹⁶⁷ It would look very much like an injustice for two identically harmed people to receive different sums because one has expensive taste and the other is content with simple pleasures. For the system to work one must, though it is difficult to see how one could possibly, without arbitrariness, determine which cost can be recovered by the claimant to achieve that happiness. The difficulty can also be considered in terms of mitigation. There might be no strict application of the doctrine – we have moved beyond evaluation of the recoverable loss to a question of evaluating some form of substitute – but it would not be unreasonable to formulate a similar rule here as a matter of policy. It would not be right to allow a claimant to concoct wildly extravagant pleasures to increase her award or punish a defendant; claimants should be encouraged to keep costs low. Why would the result of this ever, though, be anything other than a zero-sum award? It is not clear as a matter of principle why a defendant should pay for *any* substitute pleasure if equivalent happiness could be obtained for free.

A potential guiding criterion might be seen in the similarity of the proposed substitute to activities undertaken by the claimant prior to injury, but a number of difficulties attach to that. First, it is not immediately obvious what the criteria of similarity for such an enquiry might be, beyond perhaps an application of judicial 'common sense'. Second and more vitally, the idea seems to require a unitary idea of non-pecuniary loss as amenity loss. It might not be the case that the claimant's lost happiness derives from an inability to do something she previously enjoyed, ¹⁶⁸ and if it is not so we face fatal further questions. What should the activity then be 'similar' to, for instance? One might answer: the claimant's present pursuits. But what principled reason is there for a substitute happiness (for loss unrelated to inability or incapacity) to be provided in the form of activities

¹⁶⁷ *West v Shephard* [1964] AC 326, 368 (there suggesting that the loss of a limb does not lead to a loss of happiness, only redirection of activities).

¹⁶⁸ An apparent advantage of happiness-centred theories of non-pecuniary loss is precisely that they subsume under one banner the myriad forms of non-economic detriments.

presently undertaken? Any individual's range of pursuits at a given point in time certainly does not (or at the very least does not necessarily) represent a complete closed category as regards that individual's capacity for enjoyment; it is hard to imagine any claimant suggesting that there is nothing she does not already have or do which could bring happiness, and it might not be an unusual case where there is an unpursued pleasure which could provide 'better value' on happiness and cost. Perhaps the claimant would even become fatigued by undertaking the same endeavour more, and so the net result would not (at least without an accounting for the effect and thus yet more estimation and expense) be the desired increase in happiness. Even turning to consider cases where lost amenity *is* at issue, more severe injury will tend, unhelpfully, to there being fewer if any similar pleasures on whatever chosen definition of 'similar'.¹⁶⁹

One positive aspect of the forward-looking, substitute happiness approach is that it clearly avoids exclusively or excessively focusing on the past where the detriment to the claimant is understood as stretching into the future. The orthodox model based on valuing injuries and effects arguably falls foul of that problem. The nature of past and future losses in any particular case can differ very considerably indeed. Tastes and abilities can change and develop over the course of a lifetime, or relatively short periods, and with various factors beyond the claimant's age.¹⁷⁰ The true core of the 'difference made by the tort' is not necessarily anything to do with her past pursuits, but may be changes to her future. There may be almost no indication at all of what the claimant in question might have taken up and enjoyed from the myriad life pleasures otherwise available. The future is not forgotten in orthodox treatment and is factored in at least notionally,¹⁷¹ but the single sum

¹⁶⁹ Consider the obvious example of an enthusiastic sportswoman rendered tetraplegic.

¹⁷⁰ The point is related to the idea that losses as understood at any particular moment cannot be said necessarily to properly, non-arbitrarily represent the true detriment involved; see above, III.2.

¹⁷¹ Explicit discussion of 'future loss' concentrates on (pecuniary) loss of future earnings or cost of future care. Cf e.g. *Ronan v Sainsbury's Supermarkets* [2006] EWCA Civ 1074; (2006) 150 SJLB 921, commented by J McQuater, 'Personal injury - assessment of damages - loss of earnings - past and future loss' [2007] JPIL C19 (claimant too young to have a defined career path). The extent of the breakdown of future lost earnings and the

approach folds everything in together. It is then almost inevitable that the focus will tend towards the more easily and precisely definable past. The claimant can present many (though has no hope of ever coming close to presenting all) aspects of loss experienced up to the time of trial clearly, but might only be able to offer a relatively unfocused account of its future development or her future feelings.¹⁷² Natural instinct will tend to focus the assessor's attention on that which is most certain, which, at least for lasting injuries, might least express the life changes. If we are to focus on effects and happiness, we must still recognise that we are inevitably left with a deficient expression.

Whilst it might be contended, in answer to these informational issues, that something like provisional damages awards could resolve the problems raised, this is insufficient. Provisional awards currently require relatively specific information from the outset (the award must explicitly detail the relevant contingencies being contemplated and for which an additional future sum might need to be awarded¹⁷³) and cannot be convincing in theory, given that at any point at which a variation is sought the same informational imbalance will pertain.¹⁷⁴ Moreover, future developments will not render any clearer the opportunity harm about which too little was known at the original hearing, only having relevance as a guide for what the claimant might do yet further in the future (and certainly not for what the claimant would have done with her present had the negligent wrong not occurred).

In short, whilst happiness as a common currency for non-pecuniary loss would seem only to increase the conceptual problems in general, a functional approach to valuation

variety of assessment approaches taken to counter particular uncertainties contrasts strongly the unitary and vaguely conceived approach for non-pecuniary loss.

¹⁷² An information imbalance less problematic in the case of pecuniary losses, including lost earnings, given the existence of stronger data (the existence of an employment contract; data on career progression; general record-keeping for earnings and tax etc.) and the greater stability generally in working patterns (generally, switching career paths entirely and retraining radically contrast with the looser commitment most would have towards leisure activity).

¹⁷³ Senior Courts Act 1981, s. 32A (1); Practice Direction 1 July 1985 [1985] 1 WLR 961. Cf. chapter 1.IV.2.

¹⁷⁴ Albeit perhaps to a lesser degree; the situation is reminiscent of Zeno's paradox of Achilles and the tortoise.

would seem to also increase the practical problems in selecting and identifying losses. Either variant represents too little progress on the flaws of current orthodoxy.

4. Interests

The loss in question could, as a further unorthodox suggestion, be understood in terms of more abstract rights or interests.¹⁷⁵ This will complicate any question of rationalising the award and tension with the instrumental aim of compensation is still inevitable. However, there are certain cases where this form of analysis may seem a very obvious means by which to attempt to explain an award. The conventional sum given for loss of reproductive autonomy is one example.¹⁷⁶ Similarly, it does no violence to common linguistic or legal understandings to see the infliction of pain and suffering as a question of emotional integrity. A number of modern (heterodox) theories fall into this category in their use of rights, most prominently Stevens.¹⁷⁷ As this thesis also proceeds using a more abstract basis (in interests), these theories will arise for discussion in later chapters as counterpoints to aspects of the new framework. One theory based in the ‘claimant’s interest’ is different, however, and requires treatment now.

As noted at several points above, Tettenborn has attempted to provide a novel solution to the difficulties associated with the loss concept in practice and theory by abandoning the focus on loss in the traditional sense in favour of a loose valuation of the claimant’s

¹⁷⁵ That recovery in a given tort action might serve as protection for personal interests beyond the immediate thrust of the action is not novel, nor that this protection might be effected by damages awards without reference to (further) liability conditions – see for example David Ibbetson, ‘Iniuria, Roman and English’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), positing (a ‘cryptotype’ tort for) the protection of claimants against contumelious behaviour (itself grounding no cause of action) couched in aggravated and punitive damages awards in recognised causes of action.

¹⁷⁶ See *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309. It seems already to be questionable whether such awards are ‘compensatory’ at all; Lord Bingham certainly explicitly stated that they were not – *ibid*, [8].

¹⁷⁷ Robert Stevens, *Torts and Rights* (OUP 2007).

interest.¹⁷⁸ This deploys a much less useful concept of ‘interest’. For Tettenborn, loss is a normative and evaluative idea of the same kind as causation and the question for a court is not whether or not there is a ‘loss’, but simply what the proper monetary value to be placed on the claimant’s ‘interest’ is in the circumstances. The focus is not on particular, defined regions of right or protection and interferences with them, but a loose sense of the extent to which the claimant is touched by the wrongdoing. Pecuniary losses are said by Tettenborn to be easy because there is a conclusive means of valuing this; non-pecuniary losses hard because there is not. The approach is seen to have a number of advantages, extending far beyond non-pecuniary loss recovery, but we might note by way of examples that it avoids some of the terminological difficulties which plague the area, can explain the trend whereby non-pecuniary losses are ‘regularised’ to pecuniary losses,¹⁷⁹ and offers an elegant simplicity in an area with many categorisations and fine distinctions.¹⁸⁰ It still proceeds, however, on the assumption that a ‘value’ for the interest in question can be ascertained (and with an acceptable degree of certainty), that it is correct to do so, and that there is no abstract distinction between pecuniary and non-pecuniary elements of an award (the only difference is the practical accuracy of evidence available). Tettenborn moreover contends that abandoning the loss concept does not render the valuation more uncertain, and that just as causation has not degenerated into a ‘free-for-all’, the introduction of a coherent theoretical basis should in fact render awards easier to deal with.¹⁸¹ This interpretation of the state of causation is generous and questionable.¹⁸² Causation tests also benefit in operation from more external (‘objective’) reference points than many non-

¹⁷⁸ What follows is derived from Andrew Tettenborn, ‘What is a Loss?’ in Neyers, JW, Chamberlain, E and Pitel, SGA (eds), *Emerging Issues in Tort Law* (Hart 2007), in particular 456 ff.

¹⁷⁹ It is simply a question of evidence for valuation purposes – see *ibid*, 459.

¹⁸⁰ On the advantages specifically for non-pecuniary loss awards, see *ibid*, 463 ff.

¹⁸¹ *Ibid*, 465.

¹⁸² The examples which follow the author’s defence over uncertainty return to an insistence that the pecuniary instances of loss will remain straightforward and that ‘dealing with’ others is ‘unlikely to be any more difficult’ (*ibid*, 465).

pecuniary losses do.¹⁸³ Given the potential breadth of the consequences of wrongdoing, potentially stretching far into the future, and often wildly subjective in existence or extent, the abandonment of any, even nebulous, foundation in favour of seemingly open judicial discretion must be approached with caution, a fact not lost on the judiciary. In the words of Lord Pearce (in the context of rejecting a happiness standard): '[C]ourts should not lightly abandon a method of estimation that works reasonably well and achieves a certain amount of precision, for a method that is nebulous, variable and subjective.'¹⁸⁴

Given its open nature, the extent to which the approach reproduces the results achieved by the courts in practice (in terms of final value figures) is questionable.¹⁸⁵ This (in itself) certainly need not be seen as a criticism. Nevertheless, the inherently artificial nature of assessing a final figure on any approach makes the *precise* quantity less significant than the underlying normative decisions concerning where a claimant can recover and the rough relationship between harms¹⁸⁶ – but broad discretion might well undermine consistency between cases. The sheer breadth of judicial discretion and continued reliance on a value idea cement the account's status as an unwelcome development. The theory represents to this extent only an extreme form of the collapse into assessment criticised throughout the present analysis. 'Interest' is not used in the (potentially) organisationally useful sense of particular protected goods of the claimant, but in the looser sense of the extent to which the wrongdoing has touched the claimant.

A true move from understanding loss in relatively open-ended terms as effects or happiness, to understanding it in terms of impacts on identified personal interests, by contrast, could serve as a solution to several problems raised here: rightly recognising and starting to draw out normative content buried in the innocuous-seeming concept of loss and

¹⁸³ Not to mention that causation's function and underlying principles are very different.

¹⁸⁴ *West v Shephard* [1964] AC 326, 369.

¹⁸⁵ That author certainly believes the results will be the same – Andrew Tettenborn, 'Non-Pecuniary Loss: the Right Answer but Bad Reasoning?' (2003) 2 *Journal of Obligations and Remedies* 94.

¹⁸⁶ As a question of horizontal equity.

providing a basis for otherwise inexplicable outliers. These advantages will be exploited in developing a novel alternative to orthodoxy in this thesis by reference to definable personal interests of the claimant. However, proceeding on the assumption that it is possible and appropriate to simply 'value' them or identify them quantitatively must remain incorrect for the reasons suggested earlier in this chapter. More work is therefore needed to form a defensible approach here.

5. Interests and identification

It remains, of course, arguable that it is equally arbitrary to focus on one interest or framework of interests as any given sense of effects, but a more restrictive idea at this level of abstraction draws the important normative discussion underlying recoverability to the surface rather than burying it. An interest-focused approach does also have the advantage of generality. To say of someone in a more general way that their interest in bodily integrity has been interfered with can at least succeed in encapsulating the broad-ranging effects where an attempt to list them individually would fail.

The significant difficulty then arises that this expression is too general; that it is simply unable to differentiate between the immense variety of forms and extent of infringement clearly established in practice. There is an inherent tension here between this need for sufficient precision of definition to differentiate between interferences, and the impossibility of (and unhelpfulness of the attempt at) complete individuation. How to provide room for and manage that balance will, again, represent key obstacles in the development of a new alternative in the chapters which follow.

V. Conclusion

In conclusion to this review of the standard framework for non-pecuniary loss recovery, it is clear that the current orthodoxy is deficient in numerous respects, beyond even those which emerged in the outline in chapter one. There is, at its very heart, a fundamental lack of transparency in understanding the guiding criteria for identifying a recoverable loss, with the critical questions hidden behind a prior commitment to compensation theory and relegated to modalities of assessment/quantification. The latter assessment enquiry hides those issues particularly well behind the broad discretion it entails. Both the commitment to a comparative state-based identification of loss and the associated commitment to understanding (even non-pecuniary) loss quantitatively in terms of monetary value are inherently difficult. Comparative state assessment fails to describe accurately instances where intuitively there is certainly loss. Value and quantitative understanding have controversial implications for our sense of personhood, and difficult conceptual implications for the relevance of responses to non-pecuniary harms. Simply disregarding these difficulties does nothing for improving our understanding or practice or seeing off the arguments raised against recovery for non-financial harms. Furthermore, loss so understood is ill-suited to practical needs, even where at the level of assessment a change in understanding occurs. The selection of losses within the claim format is guided less by any meaningful idea of loss boundaries and normative engagement with the issues than by broader, unarticulated concerns or else an irreducible underlying arbitrariness.

Meanwhile, no existing alternative framework for loss is capable of correcting these difficulties – resting on one or more of the flawed structures deployed by the orthodox theory, in particular the commitments to comparative state identification and the centrality of both numerical value and the reduction of difficulties to assessment concerns. It is for this reason that a new approach is required; the chapters which follow will now begin to outline one. The new proposal will be loss-driven in order to overcome these foundational identification problems and will, in particular, be qualitative, non-comparative and interest-

focused. The proposal will then be seen (in chapters five and six) to be capable of proceeding to assessment of a damages sum in a way which resolves the further tensions between theory and practice seen here.

Chapter 3 – Loss Reconceptualised

I. Introduction

Having considered in the preceding chapters what concept of loss, and what framework of assessment, is used for non-pecuniary loss in modern negligence, as well as the difficulties which attend it, this and the following chapters now turn to the question of reforming our understanding. In this chapter, an attempt will be made to take the criticisms of, and inconsistencies in, the existing analyses of loss as key evaluative ideas for a new approach, one which can provide a sound guide for personal loss damages.¹ This approach will endorse replacement of the open-ended, value-centred notion of ‘non-pecuniary loss’ with categories of ‘detrimental events’. This is a reconceptualization of loss, not a replacement for it, but one which achieves a greater level of coherence and rigour than our currently dominant understanding.

In line with this reworking, the term ‘non-pecuniary loss’ will be avoided from this point onward when referring to the new concept; instead, the term ‘personal loss’ will be used (adopting Exall and Munkman’s preference²). In proposing a positive concept for personal loss, independent of pecuniary loss in particular, it would be inappropriate and confusing to continue using the old, negative term. The new term carries important advantages in itself.³ Moreover, the proposed framework will deplete the already somewhat shaky relevance of other, common terminological divisions of losses. It will become clear through the main argument in the chapter that overarching descriptors such

¹ It will be remembered that it is taken as understood here that an award must be made – see chapter 2.I.

² Gordon Exall (ed), *Munkman on Damages for Personal Injuries and Death* (12th edn, LexisNexis 2012), paras 2.7 ff. ‘Non-pecuniary loss’ will still be used where damages on the traditional understanding are referenced.

³ IV.1.

as ‘objective’ and ‘subjective’,⁴ or simple divisions between ‘pain and suffering’ and ‘loss of amenity’,⁵ serve no helpful purpose under the new proposal. These categories would thus be eradicated in their present form.⁶

One of the primary advantages of the new understanding is that it is capable of achieving a greater separation between the identification of a loss and the assessment of a damages sum to be made in response to it. Enforcing this division as a key structural component of the framework is both novel and critical. Only when the two are treated as separate ideas can the normative weight of loss be appreciated⁷ and due regard given to each of the two stages of this remedial process – (first) pinpointing the ‘bad’ which is to be corrected and (second) transforming the ‘bad’ identified into a monetary response are important evaluative steps which must be understood in the correct order and in their own terms. (There is of course also the step of establishing that the relevant ‘bad’ was caused by the wrong). The bad suffered should be comprehensible without reference to its cause or what the law plans to do about it, and our sense of how much money is appropriate as an award will be subject to any number of considerations wholly unconnected with the initial, rather singular question of whether there is a loss in the first place.⁸ Whilst more attention is given to the separation and sequencing of elements of the *liability* question in negligence⁹ (and product liability, as a further example¹⁰), such basic divisions are not yet clear enough in current remedial understandings, given the rush to quantification.

⁴ On which, see in particular below, II.3.b., c.

⁵ See below, II.2.

⁶ The concepts of ‘pain’ and ‘suffering’ as individual loss events will survive, just not the use of those words as an overarching category label for ‘felt’ or ‘subjective’ losses. See below, II.3.a, b.

⁷ On which see below, at the end of section II.2, and chapter 2.

⁸ On the nature of assessment and relevant factors in that enquiry, see chapters 5, 6.

⁹ See for example W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 5-004 on the sequence (citing Kirby J in *Neindorf v Junkovic* [2005] HCA 75 at [55]). The basic point could be made by simply clarifying that causation of the damage by the breach of duty cannot be tested until the breach and damage have been identified. Equally, a breach of duty presupposes the establishment of a duty, whose existence is related in turn to the damage involved.

¹⁰ See *Wilkes v Deputy* [2016] EWHC 3096 (QBD)[58] (Hickinbottom J).

Recognition is sometimes given to the issue by the courts,¹¹ but it should be a key structural feature in the theory and recalling it helps us to focus on loss.

For this reason, the development of the proposal here follows a relatively strict division (across the remaining chapters) between different processes in the remedial enquiry, where each is independently significant and must occur in the correct order. In summary, the new personal loss concept proposed will turn on the identification of an occurrence (event) which is detrimental in impliedly raising a negative implication about an interest of the claimant which is inconsistent with the extent of that interest as far as the law is concerned.¹² The extent of the inconsistency depends on the seriousness of the implied claim, which is in turn determined by the event and its consequences as suffered by the claimant. A damages award will be seen to serve as a corrective insofar as it impliedly raises a counter-statement to the original implication.¹³ The outline in the present chapter is only concerned with the initial step in that summary: identification of the detrimental event. Chapter four will go on to nuance this event-based concept further by reference to a number of additional issues, including the duration and severity of injuries as defining qualities of an event and the specific problem of death. The detrimental aspect of an event, and the assessment of a damages sum as a counter-statement to the negative implication involved in it, will then be dealt with in chapters five and six.¹⁴

Within the current chapter, then, section II will outline the binary foundation of the detrimental event approach – detailing the event structure and the definition to be given for relevant kinds of events (in terms of detrimental implications), as well as providing an outline of a number of examples for event-based losses. Section III will go on to discuss

¹¹ See e.g. *Smithurst v Sealant Construction Services* [2011] EWCA Civ 1277 [10] (Moore-Bick LJ).

¹² See in particular below, II.

¹³ The move to consider this assessment portion occurs at chapter 5, once the loss discussion is complete.

¹⁴ Chapter 4 will touch upon certain assessment points, though, as and when confronting them becomes necessary to clarify the uneasy boundary line between the two; see chapter 4.II and chapter 6.II.1.a.

the relationship between this and actionable damage. Section IV presents a number of additional advantages in clarity achieved in deploying the binary event approach.

II. Detrimental events

1. Events

Within the context of a broader discussion of the nature of ‘harm’, a recent suggestion has focused that question around an event idea, rather than the traditional ‘state-based’ accounts.¹⁵ A similar focus would, it will be argued, allow the necessary reconfiguration of personal loss. This section outlines how that might look. It will be recalled that ‘state-based’ accounts are theories which identify loss by reference to the resultant state in which the claimant finds herself after the tort. As discussed in first two chapters, loss is currently identified in the differential between this state and the state in which she would have found herself but for the tort (or else the state in which she was before the tort).¹⁶ An event-based account instead entails that the existence of a loss be determined first and foremost by reference to the incidence of a defined kind of event, rather than any change in the claimant’s state. The idea of loss in the damages context is naturally quite far removed from a generalised account of ‘harm’, and so it is not possible to import Hanser’s complex framework, whereby harm boils down to the incidence of events characterised by a ‘loss’ of basic goods,¹⁷ straight from Hanser’s piece referenced above. Loss here is necessarily more limited and serves an important and particular function within the law of damages in designating the material for a remedial response. Nevertheless, the account of loss which

¹⁵ The terminology is borrowed from the relevant piece: Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421.

¹⁶ Cf. chapters 1.II.2 and 2.II.1.

¹⁷ Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 440 ff.

follows will borrow the underlying foundation of an event basis and tailor a solution to the negligence damages context.

Before turning to a discussion of what quality can be used in defining any particular historical event as ‘detrimental’ and thus relevant for loss and an outline of how particular loss in practice can be reinterpreted on the event framework,¹⁸ it is important to note the structural advantages which may be gained by starting to build a loss concept on an event basis. This kind of non-comparative analysis is structurally appealing in the loss context not least insofar as refocusing our understanding so that we seek in the first instance to identify particular historical events rather than a more nebulous loss idea serves to transform an open, general, evaluative enquiry (what is the value difference made by the tort) into discrete, binary questions of historical fact (‘has *x* happened?’). Identifying the relevant binary questions to ask, meanwhile, will draw out the important normative considerations in the choice of losses for which damages are awarded, both in terms of claimants deciding what to include in a statement of claim and courts deciding whether such events as pleaded do constitute losses (i.e. are detrimental in the sense to be discussed below¹⁹). The framework engages those (otherwise obscured²⁰) normative issues in isolating historical facts which justify such classification. Court-accepted varieties of event will form an authoritative canon from which a claimant can thereafter simply select. ‘Has C experienced pain?’²¹ is a simpler first question (as will become clear, it is followed by a more complex assessment question) more easily and less arbitrarily answered than ‘what is the value of the pain-related difference made to C’s life?’ Additionally, of course, a claimant might have experienced and so attempt to plead a novel variety of loss event, in which situation the claimant would need to argue how the event matches the relevant

¹⁸ See below, II.2, 3 respectively.

¹⁹ At II.2.

²⁰ In numerous ways, including especially the distracting focus on compensation and value quantification, as well as the global sum form of the awards made.

²¹ Followed later by the causal question: ‘would the claimant have experienced that pain in the absence of the wrong?’

definition of detrimental events and is deserving of response; the court would then consider whether that is correct, again drawing out the normative issues. If and once recognised, that form of loss would join the canon.

Similarly, the fundamental thrust of an event-based account is that certain events are in themselves to be understood as bad for the claimant, rather than ascribing the ‘bad’ to the state in which the claimant finds herself.²² This approach is straightforwardly compatible with a purely *qualitative* identification of loss; identifying the occurrence or non-occurrence of an event does not invite numerical expression,²³ still less any need to import a difficult and controversial ‘value’ idea.²⁴ The same is strictly true of comparative state accounts in general, of course, insofar as they can conceivably simply order states relatively as better or worse than others without explicit reference to scale. Critically, however, this is simply not true of the framework deployed by the courts and would in any event not carry through to a related and relevant assessment process.

Moreover, an event-based framework is able to account for the ‘preventative’ and ‘pre-emptive’ detriment ideas discussed in chapter two.²⁵ It will be recalled that these terms describe situations in which the claimant is no worse off than she was before, or where the claimant would have been worse off in a counterfactual scenario because of an unrelated damaging event respectively. It was noted there that causation looks to deal with the problem to an extent – if we are sufficiently exacting in our causal analysis, it is possible to differentiate normatively (ir)relevant features of the timeline so as to produce a comparatively-identified loss – but this involves confusion of the loss and causation ideas. We cannot then know whether or not a relevant loss exists without already knowing about its cause (making the identification process clumsy and unintuitive) and indeed only by

²² Cf. on harm Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 422, 440 ff.

²³ This is discussed further in the next chapter in terms of the duration and severity of injuries; see especially chapter 4.II–V.

²⁴ On which see chapter 2.II.2.

²⁵ See chapter 2.II.1.

appropriating normative loss questions into the causal framework; loss then features (inappropriately) as if a purely causal result question, and causation assumes an over-extensive role. Whereas ‘preventative’ and ‘pre-emptive’ detriment situations are therefore problematic for, respectively, temporal and counterfactual forms of a comparative account, it should be clear that an event-focused conception does not suffer from the same difficulties.²⁶ In either case, the framework is able to identify a singular historical fact, without concerning itself with a relationship to other (historical or counterfactual) reference points. The identification of a fact as personal loss involves an independent normative decision, not ceding the issue to causation. Equally, no question of the difficulty or arbitrariness of placing the temporal points for comparing the claimant’s position will be raised, because no marker posts are needed – the relevant points are the events themselves as they occur.²⁷ There is no possibility in particular of it being impossible to say with certainty whether or not the claimant has suffered a loss, as Nolan maintains of the orthodoxy.²⁸

A further problematic issue for comparative accounts was seen to be death.²⁹ The particulars of how death is ultimately dealt with must be left over until the next chapter,³⁰ but it should at this stage be clear that by looking at events which happen rather than differences between states at distinct chronological points we can begin to discuss death without its metaphysical peculiarities raising unanswerable questions. Death clearly occurs as an event and identifying its occurrence is not rendered problematic by the state of non-existence which follows on it.³¹

²⁶ Cf. Hanser’s analysis for harm, Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 440 ff, 445 ff.

²⁷ See chapter 2.II.1.

²⁸ Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 *OJLS* 255, 263.

²⁹ See chapter 2.II.1.

³⁰ See chapter 4.VI.

³¹ Though the extinction of interests associated with that impacts an analysis of whether the death event is a *detrimental* event (so as to constitute loss); this is the subject of the chapter 4 discussion (ibid). On the detriment idea generally, see below, II.2.

Here it is proposed, then, that to suffer a loss is to undergo a bad event, and the next point to clarify is this idea of ‘badness’ – what it is that makes an event ‘bad’ if not a resultant change in the claimant’s state? It is vital to try and provide a more precise and meaningful account than the prevalent ‘being worse off in some sense’.³² As discussed in the preceding chapter, this ‘factually worse’ proposition is indeterminate, and suffers from the various difficulties associated with a comparative framework for the identification of loss noted immediately above.

2. Personal interests

In defining what is bad for the claimant in this way, some generalised idea along the lines that recovery is for losses which the court just considers the claimant should not have to bear will not be fit for this purpose. The simplest reason is that this still begs the question why they should not be borne, the basic idea being too weak and imprecise to bear any real explanatory weight – we must (in advance) explain *why* certain events are intolerable in this way. There is also an obvious awkwardness in attempting to formulate that sort of bald claim in event terms. It would need to be reframed to focus on ‘events to which the claimant should not be or have been subject’ given that the ‘burdens borne’ idea involves resort to discussion of effects and state changes rather than events. Absent an idea of burden, the sentiment then seems to become even more unhelpful in terms of identifying the subjects of remedial response. Events to which the claimant should not have been subjected can only mean events which would not have happened but for a damaging breach of duty. This collapses the entire question into one of causation rather than loss; it must in turn surely mean the entire course of the claimant’s life after the tort, given that the entire timeline for that period will change. The causal timeline will in various respects be

³² Cf. chapters 1.II.2 and 2.II.1.

different and not all are normatively relevant. The approach, wholly causal, would be as over-descriptive as delineating ‘effects’ seems to be.³³

To frame an event-based account of loss, something much more specific must be used than this kind of generic statement (with its heavy causal overtones). If we are going to define the ‘bad’ as something which happens, the question is what sort of thing, and to what does it happen? On the latter point, one solid foundation in the law of torts is that torts protect personal interests; those fundamental goods each of us possesses as protected by the law. Such interests were discussed within chapter two of this thesis as a potential basis for a better understanding of loss, and it is this sense of interest which will now be used as the starting point for identifying fundamental ‘badness’ in an event.³⁴

It was noted in that earlier discussion that more broadly conceived ‘interest’ ideas, such as the valuation of the ‘claimant’s interest’ in a given case,³⁵ would offer no precise framework, and the precision required here calls for particular occurrences with concrete areas of protection (personal interests) to be designated relevant. As far as which interests are at issue, the most prominently recognised is certainly bodily integrity, but it is clear that the law protects a variety of others, which may be framed in different ways. For present purposes, a triumvirate will be used; bodily integrity, emotional integrity, and autonomy seem best and most clearly to represent the root contentions behind our personal loss ideas. This will be treated as an exhaustive list here precisely because it represents the recoveries for personal loss outlined here. Whilst it is not inconceivable that additions will need or come to be made, for now these three will be the focus.

³³ See chapter 2.III.1, 2 (In theory, that is, if not in practice thanks to other, only implicit ideas).

³⁴ Some might be tempted to use a novel ‘rights’ concept, but interests represent the important substance of detriment; rights are merely the formal cloak for norms – cf. Varuhas’ critique of Stevens’ reliance on rights on this basis – Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 271 f. Varuhas also argues convincingly there that a rights analysis cannot go on to explain assessment practice and the variation between different severities of injury. Similarly, we must add that rights ideas, as formal frameworks rather than substantive ideas, do not capture the underlying characteristics of personal losses critical to the critique in the preceding chapter.

³⁵ Cf. e.g. Tettenborn’s leap straight to valuation of claimant interest – Andrew Tettenborn, ‘What is a Loss?’ in Neyers, JW, Chamberlain, E and Pitel, SGA (eds), *Emerging Issues in Tort Law* (Hart 2007).

If these are the personal interests on which we are focusing (the ‘bad’ lies in something happening as regards these interests), we must then turn to the question of what sort of interactions with them are relevant in circumscribing the ‘bad’. It is clear that not every event bearing some relationship to an individual’s interests can represent a recoverable loss – there are important normative judgments for a court to make over whether any given event presented by a claimant warrants a response. An example of a circumstance which does not give rise to a relevant loss would be the suffering of ordinary grief (beyond the confines of a statutory bereavement award);³⁶ despite there clearly being some conflict with the victim’s emotional integrity where grief is inflicted (just as there is where pain is caused), relevant interactions with interests for loss identification purposes are clearly defined in such a way as to exclude this example. We must narrow in on that exclusionary definition.³⁷

Probably the most common way to talk about conflicts with our interests is to ask whether or not those interests are ‘infringed’. However, any conceptualisation focused on ‘infringement’ or ‘diminution’, whether literal or metaphorical, necessarily implies another untenable quantitative idea.³⁸ Infringement is a spatial idea, like encroachment, which implies that the subject is capable of quantification. Diminution, likewise, simply begs the next question of the level of reduction or diminution. Inevitably the implication and the temptation devolves to an attempt to number and/or to value what is quite removed from value and by any stretch immeasurable. Thus Stevens,³⁹ for example, immediately looks for a quantitative assessment of an infringement under his (rights-based) scheme for damages, achieving it by designating the ‘value’ of factual ‘worse off-ness’ (which he terms ‘consequential loss’) as a proxy for the ‘value’ of the infringement. Where there is

³⁶ On the former, see e.g. *Hicks v Chief Constable of South Yorkshire* [1992] PIQR P433, 434; cf. discussion of the statutory recovery in chapter 4.VI.1.

³⁷ Grief and pain are discussed in respect of the emotional integrity interest below, II.3.a.

³⁸ On the problems with quantitative loss definition, see chapter 2.II.2.

³⁹ See Robert Stevens, *Torts and Rights* (OUP 2007), 60 f, 78 f.

no such loss, he just attempts to ‘value’ the infringement itself by jumping to an arbitrary sum without the intermediate step.⁴⁰ It is these values which he would then award as money compensation. It is immediately clear how such ideas of loss would carry forward to a response to loss – the cessation of the infringement or restoration of the diminished interest. However, as we have seen already, we are dealing with harms which cannot be subject to such responses in the ordinary way. Such an idea will therefore never allow conceptually defensible progress through the remainder of the remedial enquiry and will consequently not be serviceable.

Moreover, an interest is in any case perhaps best understood not actually to be diminished or rendered inoperative (even temporarily) by the defendant having acted upon it in some way.⁴¹ If X causes Y to lose a leg, it is odd to say that Y has less of an interest, or a lesser interest, in bodily integrity in consequence, rather than that her integrity interest has less body to operate upon. Compare the situation where a person grows his hair long, or augments his body in some way: he would of course have more body in the integrity of which he has an interest, but it would be very odd to say this expanded or altered his interest in bodily integrity. Similarly, an interest in bodily integrity can cease to exist even whilst the body remains.⁴² This is not a position taken by some analyses, though, with e.g. Descheemaeker noting a long tradition drawing upon Aquinas and Grotius in inseparably coordinating legal interest and bodily fact.⁴³ The separation is recognised in passing by Varuhas (albeit in respect of defamation), who argues that the damage presumed in that tort is not to “‘real-world’ reputation’ but to the interest in reputation.”⁴⁴ That is wrong, though, to the extent that the interest persists and is what the law responds to (it affirms it,

⁴⁰ On which basis he explains awards for loss of reproductive autonomy, for example, see *ibid*.

⁴¹ On this generally cf. e.g. Arthur Ripstein, ‘As If It Had Never Happened’ (2006-2007) 48 Wm & Mary L Rev 1957, 1978 ff arguing that rights survive wrongs.

⁴² Corpses are not protected to the same extent as the body of a live person (indeed a corpse’s integrity is only indirectly protected) – see e.g. D. Dickenson, *Property in the Body. Feminist Perspectives* (CUP 2007), 3.

⁴³ Eric Descheemaeker, ‘Unravelling harms in tort law’ (2016) 132 LQR 595, 599 ff.

⁴⁴ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 278.

not resurrects it⁴⁵). The true question is how the ‘real-world’ situation is evidenced – i.e. not by reference to the understandings of any *particular* persons.

A more promising idea is to focus instead on the idea that the defendant has brought about factual circumstances which, conflicting with/contradicting the victim’s protected interests, suggest to a *notional observer* that the victim was not so protected. Instead of considering some sense in which there is diminishment of an interest, we focus on events insofar as they belie someone’s interests; insofar as they raise implications inconsistent with the existence of that fundamental, protected interest by suggesting that the interest does not exist (to the extent the law in fact maintains that it does). In this sense, when a wrong has been committed, the claimant’s personal interests remain intact regardless, but there are real world incidences (events) in consequence of the wrong which are inconsistent with them. The bad in a detrimental event is the fact that the event raises such a significant, untrue implication about the state of the claimant’s interests (in bodily or emotional integrity etc.) from the perspective of a notional observer. This produces a two-part structure which is an immediate candidate for the division of the identification and assessment processes – the loss is identified as the event raising a negative implication; the negative implication it raises can go to define the detriment upon which the assessment will bite. It thus allows for a binary event identification based on exposed normative reasoning and clear, discrete events (avoiding notions of quantity or comparison), whilst still allowing for a detailed, non-binary analysis to overlay that (the discussion of which appears in chapters five and six).

Before moving on to outline some example varieties of personal loss events in the sense just described, it is worth briefly saying something more about the framework those losses will fall into. The interests at issue (for the purposes of this thesis bodily integrity, emotional integrity and autonomy) are the primary categories in the division as the primary

⁴⁵ Cf. the vindication discussion in chapter 5.

reference points for definition of the detrimental aspect of the event. Detrimental events will be understood according to the interests to which they relate. This represents another marked shift from current understandings, which start by dividing two varieties of effects – pain and suffering and loss of amenity.⁴⁶ That dichotomy does not map onto the interests framework, and will not be replicated at the less abstract level of the framework where individual events appear. Pain and suffering as effects of injury are (coincidentally) mirrored without difficulty in the personal loss framework, because their incidence can happily be accommodated as a variety of relevant event.⁴⁷ Loss of amenity, however, will disappear entirely – there is no real basis to suggest that there is a protected personal interest in ‘amenity’ and the term has no practical utility or descriptive value where losses are ordered according to the interest they engage (especially insofar as it cuts across interests). Recovery will certainly occur on the same facts that now produce loss of amenity awards, but those awards will be understood specifically by reference to one or other particular interest.

3. An outline of detrimental events

This brings us to the point where it is possible to discuss particular examples of events which will clearly fall under these interest categories and (thus as detrimental events) represent losses. The decision whether any particular event outlined by a claimant can be accepted and so join the canon of detrimental event precedents will fall to the courts, but a great many are already identifiable given the current commitments of the courts to recovery under particular factual matrices, as well as their intuitive appeal. The process of

⁴⁶ Albeit that in practice general damages are awarded as a lump sum covering both of those categories (and certainly the Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015) does not give anywhere near that level of significance to the division, treating them rather as factors modulating final sum assessment within an injury category).

⁴⁷ See below, II.3.a.

courts determining the issue as a whole serves a channelling function – a claimant will always have the option to plead a novel event (and the categories will never be closed),⁴⁸ but a framework will build up from the different events once they are authoritatively recognised (this contrasts somewhat with the orthodox approach, where, with the focus on value diminution, only the eventual sums have any [and thus little] precedential value). For the most part, an average claim in practice will consist in selecting the applicable events from those recognised (and proving their occurrence on the facts). In itself that is no great departure from the non-pecuniary loss model. As discussed in chapter two, the conceptualisation of loss as valuable injuries and effects in theory meant any and all effects of injury held a place in the accounting, yet in practice extensive descriptions of the myriad forms of effect are forsaken in favour of more limited ideas.⁴⁹ The advantage of the personal loss model here is, though, that we are again recognising the underlying decision-making process, as well as providing a conceptual structure for it – whether or not the event is featured depends on whether it represents an implied inconsistency with the claimant's interests from the perspective of a notional observer. The model thus draws out the choices being made, explains the basis on which they are made, and so reduces the apparent arbitrariness of the enterprise.

The framework of events so created only need be two-tiered in the sense that we can understand each of the events as being situated directly under one of the interest headings – loss A may be defined in terms of its conflict with bodily integrity; loss Y in terms of its conflict with autonomy. It might be useful in practice, however, to use further descriptive labels to aid reference to events of different kinds which form a subset within one particular interest category. For example, the discussion immediately below will turn to what we can term 'physical injuries'. 'Physical injury' has no conceptual importance (if A,

⁴⁸ Or alter a recognised one – see chapter 4.II, III on flexibility and medical developments in the understandings of severity and prognosis.

⁴⁹ See chapter 2.III.

B, and C can be identified as bodily integrity-related losses, it is of no fundamental consequence if A and B can also be described as physical injuries), but can be helpful in practice in grouping events. It may be useful, for example, to discuss physical injuries and psychiatric injuries as separate groups with shared characteristics, albeit individual items in both groups fall as events in conflict with bodily integrity. In turn, we might isolate ‘skeletal injuries’ or similar groups within ‘physical injuries’. It might equally be useful to compile a descriptive outline of recognised losses, not unlike the Judicial College’s assessment guidelines; if it incorporated these additional, helpful groupings, it would take the same pyramid structure as that guide. The whole there represents a category ‘personal injuries’, within which there are subsets (e.g. ‘Psychiatric and Psychological Damage’ at § 4; ‘Facial Injuries’ at § 9), which in turn have further subsets (§ 9.A ‘Skeletal Injuries’; § 9.B ‘Facial Disfigurement’) and so on.⁵⁰ Whereas those guidelines are, however, just a series of labels to help claimants and assessors navigate their way to value figures (the only authoritative ideas), loss events recognised as such under the personal loss framework would themselves be the subject of authoritative recognition. If a practitioners’ guide of the Judicial College variety were to be created for a personal loss framework, therefore, it would thus have to catalogue recognised loss events as recognised by the courts as well as the associated value figures.

We will now begin with some of the most important instances of personal loss, and then proceed to consider less standard events. In doing so, no attempt is being made to form a comprehensive outline for detrimental events (not least because the categories would not close), nor to remould recoveries in current practice in any comprehensive way – this is only a snapshot, highlighting important examples to explain the loss concept proposed.

⁵⁰ This structure betrays the tendency to view loss at least initially in terms of injuries and not effects – see chapters 1.III.1 and 2.III.1 (and compare the split structure in this thesis of *event* identification [chapters 3, 4] and *detriment* assessment [chapters 5, 6]).

a) Physical and psychiatric injury, pain and grief

We start with probably the most critical and common variety of event: the incidence of physical or psychiatric injury. This is of course a multifarious category of events, but each would relate to (stand in conflict with) the claimant's interest in bodily integrity (understood to include health more generally). Understanding bodily injury in event terms is relatively straightforward – rather than focus straightaway on the extent of effects brought about by, for example, a broken leg, we look first to the event: the breaking of the leg. Medical diagnosis and analysis can do much of the work here in identifying and classifying the bodily aberrations occurring, and in reality this is already how practitioners must proceed. It has already been suggested in the preceding chapter that outlining the effects necessarily occurs through the channel of the injuries which produce them. To move to an event-framework we really only need to focus identification on that injury aspect; the effect issue is postponed to the assessment of the detriment enquiry. Omissions cases might then seem to present more difficulty, but in reality they do not: the key is to remember that we are concerned with the loss events themselves, so in a case where loss results from non-diagnosis, the loss event will be the disease or injury (and the causation enquiry will limit recovery for it to its duration after the wrong and the severity level which would not have existed but for the wrong⁵¹). Similarly, in cases of non-improvement of the claimant's position, the loss event will be the entry of the relevant bad (and causation will limit recovery to the relevant part caused by the wrong). Finally, it is worth mentioning failure to inform cases, such as *Chester v Afshar*.⁵² The problem there should not be understood as problematic for loss here – loss clearly lies in the occurrence of the

⁵¹ On these aspects, see chapter 4.II-V.

⁵² *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134.

procedure's consequences; whether they are causally attributable to the wrongdoing is a secondary question, which may be answered on the but-for test if the patient would not have proceeded (or the consequence not occurred) had the correct information been given, or else on any other test as appropriate.

After physical injury, perhaps the most important and obvious next step is to consider the incidence of pain. Pain is a well-recognised part of 'loss' in our current understandings and has immediate intuitive appeal as an item for recovery. Rather, though, than attempt to establish a quantity of pain experienced over a period of time and then attempt to value it, an event-focused framework would look first to the concretely identifiable fact of pain's incidence. The head of recovery would be engaged the moment that pain is present. In terms of its place within the structure, however, it is also conceivable that pain could be treated as merely an effect of a physical injury (part of the detriment behind that injury event). On such an understanding, pain would instead only feature in the assessment of detriment – the extent of the negative implication raised⁵³). As noted, though, pain is commonly and intuitively viewed as independently worthy,⁵⁴ and is in fact clearly and easily identifiable and separable from the incidence of injury per se. There are nevertheless commentators who would decline to recognise its independent status. One of the most prominent⁵⁵ in recent discussion of these issues is Descheemaeker, who argues that 'internal level' interferences with feelings are the mirror of interferences with external personality rights (he references *corpus*, *fama* and *dignitas*).⁵⁶ Indeed, ultimately, 'the violation of all protected, external interests...boils down to an injury to emotional

⁵³ On which see chapters 5, 6.

⁵⁴ In respect of the more general idea of harm, pain is likewise seen to be something of an idiosyncratic category, with apparently heightened moral importance; consider e.g. Seanna Shiffrin, 'Harm and its Moral Significance' (2012) 18 Legal Theory 357, 382 ff.

⁵⁵ Others who would deny separate treatment include, of course, those who adopt the happiness approach – see chapter 2.IV.2, 3. McGregor similarly rejects the independent development of objective aspects of loss detached from subjective experience of them – discussed in chapter 1.III.2.

⁵⁶ Eric Descheemaeker, '*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 84 ff. He also argues that the same is true, though it 'might be less intuitive', for the protection of having, with an emotional response mirroring property right interferences – *ibid*, 86.

wellbeing...'.⁵⁷ For Descheemaeker, this makes it wrong for the law to account both internal and external level interferences because this counts the interferences twice (just from different perspectives each time) with potentially divergent results for each and the threat of overcompensation, and he prefers ('it seems entirely obvious') recovery for external personality rights on the basis that these more precisely specify the issue that the more general idea of injury to feelings.⁵⁸ This approach is, however, wrong.

In part this stems from qualitative differences between the incidence of pain and the incidence of an injury which causes it;⁵⁹ emotional responses and physical interferences simply do not mirror one another exactly. Pain occurs through experience rather than in physical bodily action, and is in that way separable from the injury itself.⁶⁰ This separation is most apparent in the cases on unconscious claimants, which have proved such a controversial series of decisions in the damages arena⁶¹ and where the courts have consistently made clear that heads of loss which are to this extent 'subjective' are to be treated differently. Similar divergences can be seen in such phenomena as pain syndromes and phantom limb pain, or where pain arises psychosomatically.⁶² Another important issue in the same vein is the variability of pain with pain management materials (even where the injury causing it is constant).

Moreover, we can make a normative argument as to the relative importance of physical and emotional integrity; the present author would argue that emotional integrity is of at least equal standing such that it would be wrong to subsume it within the other. To frame the point more acutely in an example: would a claimant, if able to choose one or the

⁵⁷ Ibid.

⁵⁸ Ibid, 89 ff.

⁵⁹ Descheemaeker bypasses the issue by qualifying his assertions with 'normally' or 'typically' – e.g. *ibid*, 86 f.

⁶⁰ See Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, para 2.10, or the IASP taxonomy entry for pain itself – <http://www.iasp-pain.org/Taxonomy>.

⁶¹ See e.g. *West v Shephard* [1964] AC 326; *Lim Poh Choo v Camden & Islington AHA* [1980] AC 174.

⁶² Biologically, there will equally in any event be a *scintilla temporis* between a bodily injury occurring and the commencement of pain, given the (perhaps minute) period of time required for neurological activity to bring about the pain experience.

other, prefer to alleviate the physical injury (letting pain run its course) or the pain (allowing the injury to run its course painlessly)? To answer ‘physical injury’ is far from ‘entirely obvious’ and to recognise sufficiently serious emotional integrity-related events as independent losses recognises this. Finally, in the absence of a one-or-the-other choice between external and internal interest recognition, Descheemaeker’s further arguments that trying to assess damages for experiences are particularly arbitrary and entail too broad a discretion lose their significance.⁶³ If the assessment is focused very intently on the experiential loss, with external losses concurrently doing some heavy lifting, the assessment question is not particularly broad. Moreover, there is no reason that the assessment must be as variable and subjective as that author claims – as will be seen later, the assessed detriment can range over wide brackets of figures or equally root in a relatively fixed conventional sum,⁶⁴ and could be assessed by reference only to external elements of evidence.⁶⁵

Thus, given that the incidence of pain is experiential and can (thus) follow quite a distinct pattern of incidence from any injury involved, that emotional integrity has independent normative importance deserving recognition not subsumption, and that assessment need not be as nebulous as imagined, it is proposed here that the incidence of pain really should be viewed as its own category, as a variety of event inconsistent with the interest in emotional integrity. Other examples of events (arising by experience) which would raise implications inconsistent with that interest include the incidence of suffering and distress. This placement of pain accords with its identification as an emotional and sensory experience and supports its current treatment distinct from bodily injuries which might cause it.

⁶³ Eric Descheemaeker, ‘*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 90 f.

⁶⁴ See e.g. below, II.3.c and chapter 6.II.1.b.

⁶⁵ See chapter 6.II.1.b.

Independent recognition of pain also leaves room for clearer understanding and accounting for considerations such as its manageability. This advantage will, it should be noted, manifest at the *assessment* stage of the damages enquiry (relating to the extent of the interest-denying implication based on non-binary detriment), not identification.⁶⁶ The point here though is that if pain is separated out, the relevance of manageability at the point of assessment can be better seen and controlled, as opposed to its being melded into a much broader inquiry about the effects of a bodily injury. The correlation between the impact of pain management on pain experience and pecuniary losses for securing the means of pain management can also then be seen more clearly. Pain management is a useful example of a situation where the boundary line between pecuniary and personal loss and the tendency for personal losses to become monetarized becomes acutely obvious. Whilst the existence of a management regime will affect the incidence of pain, reducing its severity and so producing a less detrimental loss, it might at the same time produce a pecuniary loss in the cost of the means of management;⁶⁷ separate treatment of pain as a loss event allows a clear view to the waxing and waning of the personal loss award for pain and the pecuniary loss award for pain management. The separate conceptual basis of personal loss, meanwhile, allows us to see this boundary line between financial and non-financial detriments more clearly, understanding why there is a distinction. Where the traditional framework is used, the borderline seems somewhat strange, with items falling either side both appearing in the same form of a value detriment, but assessed rather differently (exacerbating an appearance of artificiality or inconsistency). Under the new framework, any differences are explicable by reference to the difference in the nature and identification of the underlying 'bad'.

⁶⁶ On which in general see chapters 5, 6, especially 6.II.1.b.

⁶⁷ Recoverable in the same way as any other medicine costs. Again, see chapter 6.II.1.b.

Finally with respect to emotional integrity-related losses, now is the time to confront the issue of grief, which a note above has already indicated is not considered a recoverable loss.⁶⁸ It is perfectly plain that the onset of grief represents an event, which suggests that its position outside of the canon of recoverable losses must relate to whether it raises an implication inconsistent with the claimant's emotional integrity interest: if the event raises no negative implication then it does not occur as a recoverable loss. The answer as to how it raises no negative implication for a notional observer can be seen in its inevitability and ordinariness, and discussions of grief (and similar experiences) often use phrases along the lines of 'normal human emotions'⁶⁹ in the course of denying recoverability. Grief is entirely unavoidable in the course of a human life;⁷⁰ indeed any particular person who is the object of grief will inevitably die, triggering that response. No observer could thus conclude on the basis of a grief experience in itself that there was any conflict with the claimant's protected emotional integrity. These ordinary emotions must, in this respect, be contrasted with the ordinary bodily processes associated with an unwanted pregnancy discussed below, which are rendered as loss (only) by virtue of the autonomy implication.⁷¹

b) Experience and the subjective/objective distinction

With physical and psychiatric injuries and pain and suffering now in place and grief dispensed with (and with the spectre of the unconscious claimant scenario beginning to loom), it is now an appropriate time to discuss the objectivity or subjectivity of personal losses more generally. The preceding discussion has quite deliberately referred to

⁶⁸ Leaving aside statutory bereavement awards; on which, see chapter 4.VI.1.

⁶⁹ See e.g. *McLoughlin v O'Brian* [1983] 1 AC 410, 431 (Lord Bridge).

⁷⁰ One might contrast (even naturally-caused) pain and injury. These may or may not occur; they are far from inevitable.

⁷¹ See below, II.3.c. The idea of choosing (not) to have an emotional response is of course absurd.

‘experience’ and losses which arise by it. This has generally avoided the unfortunate terminology of ‘subjective’ and ‘objective’. It should now be clear that the personal loss approach provides room for so-called ‘subjective’ (in this sense of experiential) losses to be recoverable and that the emotional integrity interest is critical. A detriment related to emotional integrity involves an emotional experience occurring, and this presents primarily evidential difficulties. The subjectivity lies in the question of whether or not the event happened, because it must happen in the claimant’s mind; in cases where the claimant is not conscious, these losses clearly cannot arise. These ‘subjective’ losses are different, however, from other ‘subjective’ forms of loss (especially the autonomy-related losses discussed immediately below), and this thesis will continue to refer to ‘experiential’ losses to avoid that ambiguity.

The thinking which surrounds the ‘subjectivity’ of loss is also generally quite loose, however, and the terminology problematic insofar as the *assessment* and *evidential* approach to ‘subjective’ losses might nevertheless be distinctly *objective*.⁷² Burrows notes, for example, that ‘...pain and suffering is assessed subjectively so that if the claimant is not capable of experiencing the pain or suffering no damages will be awarded for them.’⁷³ Despite obliquely identifying the critical issue (experience), Burrows’ use of the subjective idea is confusing. The real issue is that pain and suffering (whether seen through an effect or event lens) exist only through being experienced; if the claimant is incapable of having the experience, then there is no loss identified (the question never reaches an assessment of the extent of detriment). Consider a situation where a victim has died, but the evidence suggests there was an extensive period between the first injury and death during which the deceased was (as far as the evidence suggests) conscious. Regardless of whether *subjective* evidence as to the deceased’s pain experience or its extent is adduced, the court is capable

⁷² On the conceptual underpinnings of the assessment stage on the proposed approach, see chapters 5, 6.

⁷³ Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004), 272.

of concluding that pain was felt and assigning an objectively reasonable damages sum. Despite being ‘subjective’ (in the sense of experiential), the loss can thus be identified and assessed objectively. The case of *Kadir v Mistry*⁷⁴ serves as a very clear and recent example (albeit one concerning fear, not pain), on the basis of which it can clearly be said that if the claimant shows good objective reason to fear, then ordinarily a subjective fear (and attendant anguish) will be inferred.⁷⁵ Insofar as pain is inferred rather than demonstrated, assessment equally cannot follow on a subjective basis. ‘Objective’ and ‘subjective’ are deeply unhelpful labels for loss here.⁷⁶

c) Autonomy

Where the autonomy interest is at stake, the loss may be ‘subjective’ in another, quite different sense; the question of the event happening depends on the claimant’s (capacity to make) active choices, rather than passive experience. This will be discussed further below, after first presenting a number of examples of autonomy-related detrimental events.

An example (albeit representing a recovery controversial for several modern commentators⁷⁷) of such an event would be a loss of congenial employment.⁷⁸ Congenial employment awards are made to cover situations where the claimant’s occupation was particularly fulfilling or had been particularly important to them before it was lost. They are made alongside loss of earnings and other pecuniary employment awards and are modest in size.⁷⁹ Awards can be made where the career in question has been chosen, but

⁷⁴ [2014] EWCA Civ 1177.

⁷⁵ Ibid, [15] (Laws LJ) (with whom Davis and Ryder LJ agreed).

⁷⁶ Cf. also Mark Lunney and Ken Oliphant, *Tort Law*, (5th edn, OUP 2013), 870: after quoting from Lord Scarman’s judgment in *Lim Poh Choo* (damages for pain ‘...depend on the plaintiff’s awareness...’), the authors immediately corrupt that idea: ‘Pain and suffering, then[!], is assessed subjectively...’.

⁷⁷ See chapter 1.III.3.

⁷⁸ See e.g. *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15.

⁷⁹ See e.g. *ibid*, [11] (Kennedy LJ), explicitly noting a highest award of £10,000 and the rarity of awards exceeding £5,000. £5,000 was ultimately awarded there and is to be compared with the unchallenged £15,000 labour market handicap and c. £120,000 future loss of earnings figures in the same decision.

not yet embarked upon,⁸⁰ demonstrating that it is the inability to choose (or choose to maintain) the desirable career which is at issue, and not simply a change in the claimant's level of happiness. In the *Willbye* case, Kennedy LJ does refer to what is compensated as 'a particular disappointment', but this must be understood in context as meaning only that the loss is non-financial.⁸¹ So much is clear from the judgment of HHJ Code QC in the recent *Murphy* decision: 'The Claimant has suffered a loss of his *chosen lifestyle* and the impact of the loss of *status and personal identity* is significant...'⁸²

The personal loss approach invites us to look at this harm in terms of an event when employment options (the range of choices available) change as opposed to in terms of the supposed 'value' of the congeniality of the (prospective) employment before and after the wrong.⁸³ Chronologically, the event will occur at the point in time when those injuries arise which cut off the congenial employment option. It is submitted that such occurrences are better understood thus; as an event raising negative, untrue implications about the claimant's autonomy interest, insofar as it implies that the claimant may be hindered in the pursuit of self-fulfilment through a chosen field of employment (rather than, for instance, being related to her emotional integrity – the issue is, again, not simply unhappiness at having to leave or not enter a particular field). In seeing the loss not as a value sum like any other, but as an event interfering with a particular kind of interest, the modesty of the sums equally begins to make more conceptual sense: it is a reflection of the cautious approach to the protection of choice/autonomy adopted by the law (i.e. the product of the law's normative decision-making). In the vast majority of cases, the law is not interested in the denial of particular choices – a point touched upon in chapter two insofar as we are not interested in every effect a wrong has on the claimant; any injury closes off all sorts of

⁸⁰ *Willbye*, ibid.

⁸¹ Ibid.

⁸² *Murphy v Ministry of Defence* [2016] EWHC 3 (QBD) [187] (emphasis added): the foremost point is choice; the detriment then turns on effects on status and identity.

⁸³ Cf. also below, IV.3.

possible choices to a claimant, but except in special instances this does not serve as loss. Unless I am a skydiver, why would I list an inability to go skydiving as a loss consequent on my broken leg? And why would a notional observer pay any heed to whether or not I can skydive? On the value-focused non-pecuniary loss framework, these choices are not properly explicable.

A further digression is required here, however, and again in respect of the question whether this harm should rightly be understood as an independent loss event or else simply feature as defining the detriment aspect of the underlying injury event.⁸⁴ In outlining his argument, criticised above, that the law tends inconsistently to bridge a divide between two mirror-image representations of the harm at play in non-pecuniary losses, Descheemaeker specifically goes on to identify the use of an autonomy interest to frame losses as a particularly problematic approach. Autonomy, like dignity, is a general idea supporting the entire system of redress according to Descheemaeker, and so cannot be viewed as an interest apt to define a loss.⁸⁵ In addition to the counterargument made above in respect of the mirror approach to detriments, it is here necessary to consider further why loss of congenial employment should rightly be considered an independent loss event rather than merely a factor for determining detriment in respect of the personal injury or similar on which it follows. The critical point has, though, already been touched upon immediately above – a normative decision has clearly been made that a notional observer would understand an implication to have been raised not simply about the claimant's interest in bodily integrity, but also beyond that about her autonomy as well. A particularly significant event has occurred in respect of the claimant's choices.⁸⁶ The sort of everyday,

⁸⁴ The same question as arose with pain and suffering, above, II.3.a.

⁸⁵ Eric Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 95; cf. Tsachi Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis' in Barker, K, Fairweather, K and Grantham, R (eds), *Private Law in the 21st Century* (Hart 2017), 419 ff.

⁸⁶ Cf. Keren-Paz, *ibid*, 419, who is unclear on his answer but need not resolve it in light of the courts' clear position.

minor events concerning choices available to X as a moral agent do not rise to suggesting to the notional observer that X does not have a level of autonomy the law ascribes to us all. Where an event relates to the choices available in respect of an employment (a very important and consuming part of the average person's life) and indeed one to which X is obviously particularly attached or devoted, the notional observer does apparently see the matter as suggesting X's autonomy interest does not actually exist.⁸⁷ That idea cannot be expressed by reference to bodily integrity (so the loss event might rightly to be seen as different) and is clearly defined, limited and isolated from the general idea of simply being a moral agent with choices. To that extent it relates to some richer idea of autonomy than the so-called 'standard liberal account'.⁸⁸

The same might apply for a limited number of situations beyond congenial employment, such as those where the claimant can no longer engage in a consuming, primary hobby after the wrong has been committed. It is well-established that activities central to claimants' lives are of particular relevance for damages awards and the personal loss approach could rationalise this in terms of autonomy. The diminution in value approach of non-pecuniary loss cannot explain why one activity could be given special consideration over any other except as a mere matter of degree, and must also express the twin ideas of e.g. lost arm and lost arm-related hobby in the awkward terms of the hobbyist having a more valuable arm than other people. The personal loss approach could rely upon and thus reinforce the importance of the highlighted hobby or activity in itself insofar as it would not attempt to treat it as a mere value factor, but rather accept the event as a separate, independent detrimental event presenting conflict with the autonomy interest. Such a solution stands in opposition to the standard practice, though, which does not in fact see loss of satisfaction from hobbies etc. as producing a separate injury (in contrast to

⁸⁷ At least not exist to the extent that the law in fact recognises that it does.

⁸⁸ I.e. simply the ability to make choices – see Tsachi Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis' in Barker, K, Fairweather, K and Grantham, R (eds), *Private Law in the 21st Century* (Hart 2017), 413, likewise focusing on what he terms a 'thicker' notion of autonomy.

employment).⁸⁹ There is then a consistency problem of the sort noted in chapter one and the courts ought indeed to consider their distinction and justify it if it is to be maintained.⁹⁰ As argued throughout this chapter, though, the personal loss framework does call for such normative discussion in a way the diminution in value approach has not.

The personal loss concept also has the potential to bring other non-standard forms of recovery in from the cold or force a more explicit normative discussion of them. Consider, for example, the *Rees* award for loss of reproductive autonomy, likewise highlighted as an anomaly in chapter one.⁹¹ On an event conception the idea need not be anomalous as a loss⁹² – there has been the incidence of an event bad for the claimant in a pregnancy/birth occurring contrary to the claimant’s wishes (detrimental by reference to autonomy). Freed from the quantitative, state-based understanding of loss, the event approach can also explain the singularity of the conventional approach taken by the courts: the extent of the effects are in this instance not seen as correlated with the detrimental implication to the same extent as with injuries (perhaps because other circumstances bear on them – we arrive at an idiosyncrasy of autonomy);⁹³ the analysis thus (at assessment) moves little further than the basic binary fact of a detrimental implication being raised. The award sum is thus more singular, modest and not sensitive to the extent to which the claimant is factually affected.⁹⁴ The critical point is the fact of incidence of an event (occurring at e.g. fertilisation or birth) which raises an implication incompatible with the existence of the claimant’s interest. Such events fall under the ‘autonomy’ interest rubric in the framework. As with key employments, the result is modest in accordance with the law’s nervous

⁸⁹ See chapter 1.III.3.

⁹⁰ See *ibid.* McGregor’s questioning of this inconsistency is thus entirely apt – Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-261.

⁹¹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309. See chapter 1.III.3.

⁹² No argument is being made here on the issue of what actionable damage there is in such cases. On the damage and loss distinction, see below, III.1.

⁹³ On which cf. chapter 6.II.1.b.

⁹⁴ See *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 [18] (Lord Nicholls), [8] (Lord Bingham).

tracing of the boundaries of protected regions of fundamental kinds of choice, not choice simpliciter.

Within that same factual matrix, we might equally consider another form of autonomy-engaging personal loss. Bodily phenomena associated with an unwanted pregnancy or birth should, by contrast with physical injuries in the sense discussed above, be seen in terms of events detrimental in their implied denial of the claimant's autonomy. Faced with the question of how 'natural bodily processes' can be detrimental for the claimant (on the old framework appearing as the tricky question of how those pregnancy or birth processes could be 'injuries' or represent loss of value), there is an easier answer for the personal loss analysis. No implication incompatible with the claimant's interests is raised in this context by the events of e.g. physical birth-related effects occurring, simply stated. They are raised specifically by virtue of unwanted⁹⁵ physical birth-related effects occurring. Insofar as that is the case, they do not seem to fall within the category of physical injuries, but can easily fall in a category of autonomy-related events. Dicta entirely apt to describe this idea (though intended to deal with the separate question of whether there is actionable damage⁹⁶) already permeate the reasoning in the cases here, but under the dominant understanding they render the recovery anomalous – consider for example Lord Slynn in *McFarlane v Tayside Health Board*: 'It does not seem to me to be necessary to consider the events of an unwanted conception and birth in terms of "harm" or "injury" in its ordinary sense... They were unwanted and known by the health board to be unwanted events.'⁹⁷ Lord Hope likewise seems to view recovery for even physical changes as autonomy- rather than physical integrity-focused: 'The physical consequences... of pregnancy and of childbirth are, of course natural processes. In normal circumstances they

⁹⁵ 'Unwanted' here is intended quite loosely – any physical difficulties attendant on birth are no doubt undesirable in and of themselves, but 'wanted' insofar as they are necessarily attendant on giving birth and that birth itself is desired.

⁹⁶ On the boundary between actionable damage and personal loss, see below, III.1, 2.

⁹⁷ [2000] 2 AC 59, 74.

would not be considered as a harm to her or as being due to an injury. But the law will respect the right of men and women to take steps to limit the size of their family.’⁹⁸

In a similar vein, recognition that the occurrence of bodily phenomena might raise inconsistencies with the autonomy interest rather than bodily integrity could also reduce difficulties with our understandings in areas beyond reproductive capacity. Bloom, whose discussion of the pervasive influence of cultural ideas on our concepts of harms was seen in the preceding chapter,⁹⁹ deployed that analysis to propose a broader understanding of the detriment to claimants in cases of negligently conducted plastic surgery. The issue also features in the introduction to the thirteenth edition of the Judicial College’s personal injury guidelines, with the panel considering ‘how best to accommodate the increasing trend of failed cosmetic surgery, in which... disappointed expectations may require compensation...’ as part of a review for the next edition.¹⁰⁰ Rather, though, than criticise reliance on medicalised descriptions of the bad produced in interferences with the body as Bloom suggests,¹⁰¹ it may be better to focus on understanding the importance of deviation from *desired* results (deviation being medically described). Bloom herself¹⁰² notes that ‘[the patient] will be shown photos that display a relatively narrow range of surgical outcomes.’ Account can best be taken of these aspects of choosing and deviation from a plan if there is space to detach the question from the more straightforward physical injury ideas. The personal loss framework provides room for precisely this to happen if the courts, following a normative discussion of same, see fit to recognise such events.

With a few potential detrimental events thus outlined under the rubric of the autonomy interest, we can also now return to the issue of ‘subjectivity’. It should be clear how the events just outlined relate to active decisions and choices of the claimant and so represent a

⁹⁸ Ibid, 86.

⁹⁹ Anne Bloom, ‘Plastic Injuries’ (2014) 42 Hofstra L Rev 759; cf. chapter 2.III.3.

¹⁰⁰ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), xii.

¹⁰¹ ‘Plastic Injuries’ (2014) 42 Hofstra L Rev 759, particularly at p. 763.

¹⁰² Ibid, 775.

‘subjective’ loss separate from the experiential events and more limited insofar as choices deserving protection are harder to delineate than integrity. Again, attempting to divide the losses straightforwardly into ‘objective’ or ‘subjective’ would be unhelpful – the loss’ status as a detrimental event is dependent on subjective choices having been made, but on objective removal of that choice. Once again, though, the personal loss approach can facilitate a useful framework for discussing, recognising and categorising losses; it draws out the important features of non-financial harms rather than obscuring them behind a fallacy of value. With the autonomy-related events, furthermore, the personal loss approach helps us to clarify their relatively limited (and slower developing) recognition by the courts, and reinforces the importance of making the normative decision on their recoverability clear. Given that it is possible to affect or restrict a person’s available choices and/or opportunity to choose (and thereby imply that the claimant had no protected interest to the contrary) in an untold number of ways, the threshold for recognising a detrimental implication arising from an event is crucial in maintaining sensible boundaries of recovery. Only in a very limited sense would we recognise an identifiable sphere of protected choice and drawing out that threshold explicitly, and understanding it in terms of the important interest at issue, presents a preferable solution to *ad hoc* and ill-explained recognition in terms of lost value.

4. Review

Having looked at the core sense of detriment as a quality of the events (to which the assessment discussion will later return) and outlined some initial examples of events and how they would be framed, it is clear that there are a number of more nuanced ideas which must be brought into play if the framework proposed is to be intuitively sound. It should already be clear from the foregoing that our sense of the need to identify loss is not

satisfied completely by the loss outline above; the identification process is not exhausted at the point at which we can say, for example, that a claimant's leg was broken. Further pivotal issues for identifying the loss sufficiently, in particular understanding such facets as duration, severity, and co-incidence with pre-existing injury, will be discussed in chapter four. In summary for this outline of personal loss so far, however, we can see that it is possible to produce a framework centred about the occurrence of events which are detrimental to the claimant by virtue of the implications they raise about the claimant's interests. Interests are understood here as those fundamental goods protected by the tort of negligence, here primarily bodily integrity, emotional integrity and autonomy. The detrimental events may include, by way of clear example, those within the category of physical injury, the incidence of pain or suffering or the loss of congenial employment.

As mentioned before, a key aim here has been to provide independent integrity to the identification of a loss. By detaching the identification enquiry from any sense of number or value, and concentrating instead on the occurrence or not of particular events, the issue necessarily becomes entirely distinct from the secondary, assessment question of how much money should be paid as a remedy. That latter question is in turn clearly accorded its own treatment, as will be seen in the later chapters of this thesis. Furthermore, no attempt has been made to achieve the impossible feat of selecting a singular currency for harm across all varieties of loss, but one critical structural feature (raising a detrimental implication) has been exploited.¹⁰³ In this way, each personal interest is seen as individually and distinctly important. Aside from unmasking those judgments, one important advantage won by clarifying this distinction also lies in the fact that a lot of the criticism aimed at the practice of awarding damages in this context focuses on the essential arbitrariness of the former. No sum can be right or wrong in any real sense, but this does not mean that there has not been an important detriment to the claimant (in consequence of

¹⁰³ Contrast the flawed 'value' and 'happiness' ideas discussed in chapters 1 and 2.

wrongdoing) worthy of redress. Emphasising the distinction contemplated here reinforces that such a detriment exists and any argument on the apparent arbitrariness of particular sums of money cannot bleed into the question of the existence of that detriment (and thus cannot encourage us to give it too little weight).¹⁰⁴ This steers us away from any unfortunate thinking which suggests that quantification problems should encourage us to make no award – there is clearly a sound reason for a remedial response. Despite common commitment to the idea that the law will respond and do the only thing it can, the normative weight of a loss is not always so apparent on the dominant theory outlined in the preceding chapters, where it was clear that the loss concept is often not interrogated, leaving any resolution for the difficulties in understanding a loss which is not monetary to arrive at the level of determining a monetary response.

A further element in reinforcing the independence of the loss idea is its relationship to the requirement that there be actionable damage to establish liability in negligence.

III. The structural relationship between detrimental event loss and actionable damage

1. Loss and damage

Having presented an outline of the core aspects of an event-based analysis of loss, it is necessary to pause to consider how this loss idea relates to the requirement that there be actionable damage. We must be sure to understand so far as possible the boundaries and overlap between these concepts, given their differing functional roles. Shortly stated, there is a fundamental distinction insofar as actionable damage goes to establishing liability, but loss is a question of the remedy, focusing (as described above) on identifying and assessing the ‘bad’ which follows the wrong. In the case of personal loss, this means the events from

¹⁰⁴ Cf. e.g. chapter 2.II.4.

the point of wrongdoing onwards which are bad for the claimant, based on their being detrimental in occurrence. That there is such a functional distinction has been said very recently by Nolan to be ‘rather obvious’, despite ‘appear[ing] to be controversial’.¹⁰⁵

The fundamental divergence corresponds with a divide in what circumstances serve to satisfy the requirements of damage and loss. In that regard, as an example, it is abundantly clear that suffering and distress can qualify as recoverable losses, whereas to establish actionable damage (a liability question) more is required; there must be a diagnosable psychiatric condition.¹⁰⁶ The lower bound for recoverable loss is lower still, but as noted above excludes, for instance, ordinary grief (unless, exceptionally, as a bereavement award under the Fatal Accidents Act 1976).¹⁰⁷ Although pecuniary losses are not the subject of this thesis, the divergence between damage and loss boundaries is also obvious in that context – the fundamental axiom that money, or pecuniary assets more precisely, are valuable ensures that any reduction in that value constitutes a (pecuniary) loss, but is not itself sufficient to constitute actionable damage, with pure economic loss being generally inactionable.¹⁰⁸ Furthermore, losses (at least of the same kind) should collectively represent the entirety of the perceived detriment to the claimant; any overlap or gap and the remedy given to the claimant will be excessive or insufficient. Any overlap in damage, meanwhile, simply gives the claimant more options in how to plead a claim and has no problematic impact on the result. That damage and loss thus serve different functions and arrive at different results is no challenge for the personal loss concept. Events can be fundamentally bad in their occurrence for the claimant regardless of whether their circumstances are such as to give rise themselves to a harm satisfying the test applicable to

¹⁰⁵ Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 OJLS 255, 271 and 270 respectively.

¹⁰⁶ See e.g. *Hinz v Berry* [1970] 2 QB 40. Cf. equally discomfort and inconvenience; they can be losses but they do not qualify as actionable damage – see *Hunter v Canary Wharf* [1997] AC 655, 707 f (Lord Hoffmann).

¹⁰⁷ Cf. chapter 4.VI on recovery in cases of death.

¹⁰⁸ Consider e.g. *Spartan Steel & Alloys v Martin & Co (Contractors)* [1973] QB 27; *Hedley Byrne & Co v Heller & Partners* [1964] AC 465. The discussion on this point is generally framed in terms of pure economic ‘loss’, which in light of the basic exclusionary rule for liability perhaps itself already serves to acknowledge the clear difference between loss and damage.

actionable damage (currently understood as being factually worse off¹⁰⁹). Different functions are being served, the final results differ, and clearly a different identificatory test is being employed.

However, there is at least one point of significant and critical crossover. The (what one might call) ‘primary’ loss event – i.e. the first in time – will generally arise from the same circumstances which give rise to the actionable damage which triggers liability (the harm which meets the criteria to qualify the defendant’s act as tortious). Where a car accident leaves X with a broken leg, which later leads to pain and an infection, for example, the broken leg is damage to establish liability and a loss for which there is recovery. The pain and the infection have relevance only as recoverable losses. One circumstance needs to be considered twice, therefore. Initially (analysing liability), we look at it from the perspective of whether there is damage here (of a relevant kind and extent), and then later (liability being established) we reconsider the same part of the chronology to identify an event fundamentally bad in occurrence.

Current discussion on the distinction between damage and loss tends to treat this very differently, often viewing loss under the difficult rubric ‘consequential loss’ (by which is meant loss caused by the damaging breach of duty but excluding harms which constitute damage), as opposed to (presumably ‘direct loss’ in the form of) damage. Generally speaking, there is no fundamental difference of kind seen between the two (only different causal positions).¹¹⁰ Damage in this sense is seen as those harms which found a liability (and are then remedied in damages); consequential loss as harms which do not found liability in negligence but are still recoverable in damages provided they are consequent on some damage. This neglects to emphasise that in any given case (providing that all of these

¹⁰⁹ See chapter 1.II.2 and cf. e.g. Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 OJLS 255, 257 ff; Robert Stevens, *Torts and Rights* (OUP 2007), 59, 78.

¹¹⁰ See e.g. Donal Nolan, ‘Rights, Damage and Loss’ (2017) 37 OJLS 255, 270 with further references, noting the interchangeability of the terms in common usage and the suggestion that many are thus not seeing two separate concepts.

harm follow in one causal chain) only one harm will be called on to establish damage and all else following (whether or not the facts could themselves serve independently to satisfy the requirement of damage) is relevant only insofar as it is a, and in its capacity as a, loss. This can be demonstrated, for example, on the facts in the *Corr* case¹¹¹ where, after an industrial work injury, the victim became depressive and this ultimately resulted in his suicide. The core question in the case was whether, for the purposes of the Fatal Accidents Act, the death was caused by the defendant employer's wrong. Lord Scott approaches the question illuminatingly, comparing the position to the question of the recoverability of further physical injury if that had resulted rather than death.¹¹² If the potential of a subsequent harm to constitute damage mattered, however, then this comparison could not work – the personal injury (which unlike death could serve as damage) would present a different recoverability question. Once liability is established, what matters for the remedy is a harm's status as loss and its causal relationship to the wrong. Suggesting that harm's relevance is limited to the loss question in a given case in this way is not to denigrate it – to contrast damage with 'mere' loss would be another outworking of the under-appreciation of the moral significance of loss. Loss is in reality the critical forum for identifying the bad which has befallen the claimant for *remedial* purposes.¹¹³

This discussion of the dichotomy of damage and consequential loss may be reinforced by considering some of the recent writing on the area. Here we will consider as an example the specific presentations used by Varuhas in his discussion of the concept of vindication,¹¹⁴ who demonstrates the same failure to recognise that the circumstances whereby damage arises are assessed differently and to a different end in qualifying the

¹¹¹ *Corr v IBC Vehicles* [2008] UKHL 13; [2008] 1 AC 884.

¹¹² *Ibid.*, [26].

¹¹³ Again, cf. Donal Nolan, 'Rights, Damage and Loss' (2017) 37 OJLS 255, 274, emphasising that his arguments should not be read as undermining the importance of loss in its proper application.

¹¹⁴ A discussion continued in chapter 5.III, because of the particular importance of Varuhas' approach to the argument made in that chapter about assessment on the basis of vindication. References throughout the thesis are to Varuhas' arguments as published in the Oxford Journal of Legal Studies. The arguments as recounted here have been republished in chapter 2 of Jason Varuhas, *Damages and Human Rights* (Hart 2016).

same as loss. In considering his argument, it should first be stressed that Varuhas uses the terms damage and loss almost completely interchangeably (rendering an explication of the position difficult) and maintains no clear functional separation between the liability and remedy ideas in presenting a concept he refers to as ‘normative damage’. These ideas show themselves in his approach with torts actionable per se, but the same problem (where a loss essentially goes missing) will exist with negligence.

For Varuhas, the torts actionable per se involve a ‘damage’ ‘inherent in the wrong’ for which damages are ‘automatically’ recoverable.¹¹⁵ An example is the *Lumba* case, where an immigration detention was held unlawful but the claimant would, but for the illegality, have been lawfully detained anyway.¹¹⁶ For Varuhas, an error in the judgment made was the unorthodox way the court neglected to make a substantial award automatically on establishing that the wrong of false imprisonment had been committed, instead resorting to a comparative counterfactual analysis, ‘effectively treat[ing] loss of liberty as a loss consequential upon the wrong...as opposed to damage inherent in the wrong, and therefore compensable as of course’.¹¹⁷ The use of the term ‘damage’, and the relegation of ‘loss’ to mere ‘consequential loss’, is unfortunate, because it fails to recognise the two functions of the deprivation of liberty there. That deprivation serves as a detriment which generates liability (it is ‘damage’) and as a detriment which requires a remedy (it is a recoverable ‘loss’). That item of loss, the first loss, is missing qua loss from Varuhas’ treatment.

In negligence, Varuhas attempts the opposite manoeuvre: ‘factual loss is a prerequisite to founding an action in the first place.’¹¹⁸ Leaving aside the popular use of the adjective

¹¹⁵ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 278 ff.

¹¹⁶ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245.

¹¹⁷ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 280.

¹¹⁸ *Ibid*, 268.

‘factual’,¹¹⁹ it would be preferable to reserve the term loss there. To express the point in alternative form, what Varuhas is saying is that counterfactual comparison is used to identify detriments satisfying actionable damage in negligence (and implicitly that counterfactual comparison is used to identify consequential loss in negligence). He contrasts this with the torts actionable per se, where, again, his claim is that damage is not identified by counterfactual comparison (though loss is). Varuhas goes on to assert that ‘within trespass the concept of loss has a wider meaning than loss calculated according to comparison of the claimant’s financial position given the wrongdoing and had the wrongdoing never occurred.’¹²⁰ Again, rework the unfortunate use of loss (which here appears to be an umbrella term for damage and consequential loss; what might be termed harm or detriment) and he is saying that there is no problem with damage and consequential loss being identified using different criteria. That must be true – they are functionally distinct. The real question is whether it is acceptable to identify loss (in my sense) on multiple bases. A broad understanding of Varuhas’ approach entails that loss (in my sense) can indeed be determined on two bases, with the apparent difference being that one loss (the first) is coincident with the actionable damage or relates to an important interest, whilst the others are merely ‘consequential’; there is no independent discussion of what qualifies it as loss.

This, then, seems to be the consequence of the ‘normative damage’ argument – that the first detriment is loss simply because it is also damage; that a liability question (damage) delivers a remedy conclusion (damages). Why the fact that the first loss and the damage are coincident should matter enough that it justifies a different idea of loss being used is not clear and the normative importance of the interests involved cannot manifest in that form. The causal relationship between the two would explain why the courts have

¹¹⁹ This author is not convinced that deprivation of liberty is any less ‘factual’ a detriment or that as damage it ‘exists solely on the legal plane’ (ibid, 268) and thinks the average false imprisonment claimant would agree.

¹²⁰ Ibid, 285.

never concerned themselves with doubling up the causal question – where the same detriment serves as damage and as loss there is no reason to bother asking twice whether the detriment is a not too remote causal consequence of the breach of duty. But as far as identification is concerned, it is not enough to say that it is loss because it is damage when the analysis of whether it is damage serves a very different purpose, and often reaches different results, from the analysis of whether it is loss. A further explanation would seem to be required. Varuhas has given no other indication why the deprivation of liberty in false imprisonment constitutes a loss, no concept for identifying it.

In short summary, then, If we recognise the full breadth of the independent step of identifying loss (rather than permitting the slide from damage to assessment), then we recognise that the occurrence which generates damage also generates the first item of loss and that ‘automatic’ recovery of damages is a false expression of that fact. Varuhas jumps this issue and identifies loss on two separate bases in the torts actionable per se without sufficient explanation insofar as his preference is to allow recovery for the liberty deprivation without identifying it by counterfactual comparison.¹²¹ In negligence, the same conceptual difficulty, whereby a loss is passed over in favour of a damage or assessment question, will obtain – it is just not as apparent because damage and loss are both considered to be identified by counterfactual comparison. Meanwhile, Varuhas also abandons awards like *Rees* to the status of anomaly driven by pragmatic policy and, having falsely suggested that loss can incorporate different definitions without a problem, sees relatively little difficulty in maintaining such a distinction.¹²² Both these and ordinary personal injuries are losses in the same sense, however, and the sort of divide which exists between Varuhas’ ‘damage’ and ‘consequential losses’ (i.e. damage and loss) cannot exist between them because they are not functionally distinct from each other. In short, by

¹²¹ Varuhas does in fact think that a counterfactual assessment would produce a sum for liberty deprivation (ibid, 280); whether that is correct is not immediately relevant here.

¹²² Ibid, 270 – Varuhas does though there express a preference for a systematic approach which would incorporate the recovery into a separate tort.

treating everything as ‘loss’, Varuhas allows himself to deploy various definitions where this is inappropriate. The significance of this is that (damage and loss are confused and) the boundaries of loss are being drawn in the wrong places. A similar issue, where the boundaries of forms of loss cannot be mapped properly, also arises in Stevens’ rights-based model. This draws out a division between substitutive damages for infringement of a right ipse and compensatory damages for losses consequential on a right (which do not relate to an independent right). Loss of amenity is an example of the former,¹²³ distress following a personal injury the latter.¹²⁴ The distinctions produced by this division seem false. Taking the examples just given, why should loss admit of multiple definitions where the harms are of such a fundamentally similar kind as loss of amenity and pain and suffering? Both demonstrate the key characteristics of non-financial detriments which have here been shown to be critical in forming an understanding of loss.¹²⁵

On the framework expounded in this thesis, the only line where a shift in the identification concept for loss occurs lies between personal and pecuniary forms – personal losses are fundamentally different from pecuniary loss and all personal losses (including the first incurred on any particular facts [coincident with damage] and otherwise apparently aberrant forms like loss of reproductive autonomy or congenial employment¹²⁶) can be collected together under one umbrella based on the notion of an event detrimental in raising an implication inconsistent with the claimant’s personal interests. If loss is identified on multiple bases, this risks unwarranted and unrecognised double accounting of harms. The new loss concept proposed here places emphasis on appreciating loss as an

¹²³ Robert Stevens, *Torts and Rights* (OUP 2007), 74 f.

¹²⁴ *Ibid.*, 52 f.

¹²⁵ Cf. e.g. Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 273 ff, convincingly criticising Stevens’ division as unable to explain the limits on the availability of loss of amenity damages for personal injury and ignoring key similarities across personal injuries losses.

¹²⁶ Cf. chapter 1.III.3.

independent phenomenon, resolving its confusion with damage, and serves both to maintain clarity and to prevent inappropriate discrepancies between losses being admitted.

2. Personal loss and psychiatric injury

At this stage, a particular note might be made in relation to the relationship between damage and loss in respect of psychiatric injury. Having noted that there is an appreciable divergence between the boundary lines drawn in the damage and loss contexts,¹²⁷ we might note that in the literature surrounding psychiatric harm some of the discussion of non-pecuniary losses just recounts the criteria defining where there will be liability (such as the *Alcock*¹²⁸ criteria for establishing a duty of care, for example).¹²⁹ That is a problematic equation of two quite different ideas. The reason for its prevalence, though, is presumably simply that pure psychiatric injury cases are at issue and in practice it presents no difficulty there. In cases of pure psychiatric injury, these liability criteria will need to be met to make out the claim in any event, and then at the remedy stage it will often make little sense to discuss lesser forms of psychiatric disturbance; they would be superseded. Any mere distress, for example, would be completely subsumed by diagnosable post-traumatic stress disorder. An important exception is (the ever-exceptional) grief: a statutory bereavement award is recoverable separately from and alongside a psychiatric injury claim and the position continues to receive support from the Law Commission.¹³⁰ Insofar as the bereavement award is a statutory addition, however, this is not conceptually problematic.¹³¹ Psychiatric injury *consequent* on another form of actionable damage, meanwhile, cannot be the intended subject of those discussions of recoverable losses which

¹²⁷ Immediately above, III.1.

¹²⁸ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

¹²⁹ See e.g. Robert Stevens, *Torts and Rights* (OUP 2007), 54 ff; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000), para 30.05 ff.

¹³⁰ Law Commission, *Claims for Wrongful Death* (1999) Law Com No 263, paras 6.55 ff.

¹³¹ On the bereavement award, cf. chapter 4.VI.1.

recount the liability requirements; in those cases the only issue is to find a causal connection from that earlier actionable damage to psychiatric losses. In short, the divergent treatment of psychiatric harm presents no further difficulty in terms of the damage and loss boundary for present purposes.

IV. Clarificatory appeal

Having considered the key structural changes involved in imposing an event concept, outlined some examples, and established the important divergence between this concept and actionable damage, there are three further, clarificatory advantages of the new approach which deserve highlighting. Though not in themselves critical aspects of a loss framework, collectively, and in conjunction with the foregoing, they demonstrate the breadth of the personal loss framework's appeal.

1. Terminological clarity

It has been implicit in much of the foregoing that there are terminological advantages to the personal loss framework described. By giving positive definition to personal loss, rather than defining it by reference to pecuniary losses, we recognise the important distinction involved and assert the independent worthiness of personal loss for remedy. The framework provides a unifying idea behind a personal loss, which explains the sense in which all of the relevant heads of recovery constitute 'losses' where that has not always been clear in the past (with for instance pain, or a 'natural bodily process' like birth). This is achieved without the introduction of difficult or unhelpful additional concepts, such as

‘happiness’.¹³² In adopting this framework, we can abandon the various ill-conceived descriptors which have muddled our understanding of what these losses really represent, including for example ‘non-pecuniary’ (residual, negative), or ‘intangible’ (misleading for e.g. physical injury). Stressing the independent identifiability of personal losses, and thereby their critical normative importance, and deploying an appropriate vocabulary also furthers the aim of disentangling the often intermingled liability and remedy requirements, in particular helping us to impose better order on our ideas of ‘harm’, ‘damage’ and ‘injury’ as they relate to loss.

2. Overlap between personal loss events

Another significant advantage of the personal loss approach is the clarity it can start to give to the issues of overlap between heads of loss, as discussed in chapter two.¹³³ Understanding a fundamental difference in character between pecuniary and personal detriments provides a justification for their obvious and inevitable differences in application, whilst on an open-ended and unitary ‘loss’ idea centred on value this does not seem properly justified. A consequence of this is that, where we might otherwise come to discuss overlap between losses and the ‘net’ position the claimant is in, instead of engaging in that discussion and resolving it by reference to the vagaries of categorisation or prosaic concerns about the precision of the calculation of the resultant sum,¹³⁴ we can understand that pecuniary and personal losses cannot be discussed together or amalgamated as a single sum of value-loss. The problem identified in chapter two thus disappears and it is no longer necessary to engage in convoluted questions of that kind. We cannot (as the temptation

¹³² See chapter 2.IV.2, 3 for a discussion of how little progress unification under ‘unhappiness’ brings.

¹³³ See chapter 2.II.3 – in particular this related to the *Fletcher* decision and the existence of further pecuniary or non-pecuniary consequences from an initial pecuniary or non-pecuniary ‘loss’.

¹³⁴ Cf. *ibid.*

fostered by identifying both in terms of ‘value’ and within an assessment-dominated framework would have us) mix the pecuniary and personal losses together.

There is also an extent to which we cannot discuss overlap between personal loss heads – though there may be overlap in the implications raised by them, the *events* cannot in the present sense overlap, even where they occur at the same time. Each is to this extent independently important and required to be identified and labelled as a loss in itself. Discussion later, after a treatment of the assessment stage of the enquiry, will consider overlapping implications in terms of the actual accounting.¹³⁵ The initial consequence of a focus on events for identification of loss, though, is advantageous insofar as it simplifies the issue of overlap and brings with it more certainty compared with the vagaries of judicial discretion over overlap accounting. The question of overlap is confined to assessment such that it is clear that the individual losses do not disappear or become unimportant by reason of any overlap in their implications: each deserves to be identified and labelled (again this goes to recognition of loss’ normative importance). This also deals with some of the argument over the process of multiple injury accounting and the *Sadler v Filipiak*¹³⁶ approach in multiple injury cases (assessing each injury separately and then considering if the overall sum is reasonable or needs reduction). The personal loss approach supports the first step in that approach, as it would require the court to first identify the occurrence of each injury individually. Whether the decision is correct at the level of converting those losses to damages sums and requiring a fairness and reasonableness assessment on the total sum reached remains to be seen in later, assessment-focused chapters.¹³⁷

3. Category clarity

¹³⁵ See chapter 6.II.1.c.

¹³⁶ [2011] EWCA Civ 1728.

¹³⁷ Again, see chapter 6.II.1.c.

In a similar vein, there is also at least one discrete categorisation issue for which the answer, in light of the event analysis, seems clearer – loss of congenial employment. Opinion has been divided on whether these awards constitute pecuniary or non-pecuniary harms.¹³⁸ Loss of earnings and labour market handicap are relatively straightforward ideas (the claimant can be presumed indifferent as to which particular money she has except insofar as she has correct sum of money in the end), the particular question of how important it is for the claimant to have chosen how she acquires money requires a separate award – that is the question of congenial employment. An event-focused conception of personal loss promoting a divided understanding of pecuniary and personal harms maps this separation of the quantity of money required and its mode of acquisition, and clearly supports a personal categorisation. On that basis, it is clear why a court should be free to consider a loss of congenial employment award alongside both loss of earnings and labour market handicap/loss of earning capacity awards¹³⁹ and to do so where there is no remaining financial detriment to the claimant.¹⁴⁰ Incidentally, this refocusing onto the event of change in employment status as opposed to the value of the congeniality of the employment undertaken before and after makes terminological sense. Really under the traditional understanding, the head should be recognised as loss of *congeniality of* employment if it is to fit in with a value diminution framework. Focusing on lost (rather than lost *congenial*) employment whilst searching for a lost value is perhaps one of several root causes for some observers assuming that the loss to be pecuniary.

¹³⁸ See e.g. Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (1998) Law Com No 257, para 3.20; CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 5-104.

¹³⁹ See e.g. *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15, [11] (Kennedy LJ); *Hanks v Ministry of Defence* [2007] EWHC 966 (QBD) at [43], [44] ff, [81] (Royce J).

¹⁴⁰ See *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15, [11] (Kennedy LJ): '[I]n financial terms she has been fully reimbursed, so this is really an award for a particular disappointment...'

This clearer understanding of accepted categories of loss could, furthermore, allow room for an orderly discussion of other areas of potential recovery. Property with significance beyond its market value can equally and easily fall prey to negligent conduct. In allowing for clear and separate discussion of both the financial and the autonomy-, integrity-, and emotion-related aspects of detriments, the proposed framework here allows and requires coherent discussion of why recovery is allowed or refused. Considering the negligent killing of a pet animal, for example, or the loss of a home, as a matter of consistency the framework might provide room for the claimant to plead both a financial loss in no longer having the property (pecuniary, value loss) and a personal loss in having the particular item she is personally invested in (autonomy) removed from her. Such a loss would be closely analogous to congenial employment; the significance of the particular area of employment mirrors that of the particular item in terms of personal fulfilment and expression.¹⁴¹ Such recovery might seem inconsistent with the idea that according to the courts distress (short of an independently actionable psychiatric condition¹⁴²) is not recoverable on property damage as a matter of remoteness.¹⁴³ Firstly, though, nothing in the proposal would impact on the rules for recognising actionable damage or the causal remoteness requirement in limiting a claimant's recovery. More importantly, the proposal for recovery is different in that the loss is being framed as an autonomy question analogous to congenial employment loss, rather than an emotional integrity loss of the kind generally discussed. Seeing losses clearly categorised in terms of the particular interests, as required by the personal loss framework, makes room for better analysis and improvements in consistency.

Similar discussions could also be had over a variety of other events. One, the physical changes occurring as part of a wrongful birth claim, was also discussed above as an

¹⁴¹ Cf. the decision in *Attia v British Gas* [1988] QB 304.

¹⁴² Cf. *Hinz v Berry* [1970] 2 QB 40.

¹⁴³ On which cf. *Attia v British Gas* [1988] QB 304.

autonomy issue¹⁴⁴ and we could add another very similar one – scarring. In the previous chapter, reference was made to the Judicial College’s notes on scarring in its Guidelines, observing that there is no conceptual reason that such awards should be responsive to the claimant’s gender, but then reserving the possibility that certain factors in valuing the award for scarring might be more pronounced amongst certain (gender) groups.¹⁴⁵ It was argued there by the present author that the critical aspect thereby revealed was the psychological and subjective effect of scarring, rather than the physical scarring itself, and under the personal loss framework these could be registered as separate events.¹⁴⁶ The physical scarring relates to bodily integrity; the psychological issues/suffering which might result relate separately to the emotional integrity of the claimant. Separating the two will allow us to see the impact that gender preconceptions are having, and allow us to isolate and limit its impact to the field of the psychological effects. The framework enables us to see these relationships between losses more clearly, ultimately enabling us to rationalise the system of those identified.

V. Conclusion

This chapter has sought to outline a new conceptualisation of the loss idea, and one which avoids critical difficulties inherent in the inadequate value-loss approach. The proposal identifies losses as detrimental events, with detrimental here meaning bad for the claimant in that the event raises an implied claim about one of the claimant’s protected interests, such as bodily integrity. This framework can account, as discussed above, for many of the intuitively-sound recoveries currently endorsed by the courts, but in a more conceptually coherent and equally pragmatic manner than the current approach. It allows us to discuss

¹⁴⁴ See above, II.3.

¹⁴⁵ See chapter 2.III.3.

¹⁴⁶ Cf. the discussion above on whether and to what extent a separate loss event should be recognised, rather than a mere additional aspect of the detriment involved in another be seen; above, II.3.

loss qualitatively and without reference to value (what sorts of events have occurred), and helps us to extricate the important question of whether there is a loss (focused on the binary issue of whether or not a relevant event has occurred) from the question of how much money should be awarded in response (a discussion to be conducted in chapters five and six, but drawing on the extent of the detriment/implication raised by the event).

The process of identifying events as ‘detrimental’ in the relevant sense draws out the critical normative decisions being made in recognising a loss qua loss. This reinforces their worthiness for remedy, in contrast with the obfuscatory retreat into assessment discretion seen on the dominant theory. It can, moreover, clarify issues relating to the categorisation of various forms of loss and provide a structure capable of extending to awards otherwise seen as anomalous, such as loss of reproductive autonomy. The difference between actionable damage and loss equally becomes much clearer – separating the definitions of each for separate consideration (and, as will be seen in chapter five, allowing assessment to free itself of damage-related misconceptions).

In this way, it is possible to appreciate the proper status and relevance of loss as a meaningful and self-standing construct within the law of personal loss damages (rather than one drawn from rough intuitive ideas about what loss might be as an *ex post* reconstruction after compensation has been presumed). Detached from the overriding, in reality logically subsequent idea of compensation, our understanding of loss can (advantageously) develop in the quite different way contemplated here. Thereafter it is possible to consider whether loss, when not strangled by compensation at its inception, can in fact proceed to assessment without developing the inconsistencies and tension between practice and theory seen in respect of the diminution in value approach.

That move to assessment is considered beginning in chapter five, after an analysis in the next chapter of more advanced issues in respect of defining detrimental events.

Chapter 4 – The Binary Nature of Loss Events and the Problem of Death

I. Introduction

The preceding chapter gave a first outline for a re-conceptualisation of personal loss in terms of events detrimental in raising an implied rejection of the claimant's interests. This chapter will elaborate somewhat on a number of more nuanced identificatory ideas within that framework (duration, severity, pre-existing detriments) and then turn to consider the special case of death. The issues raised here in many respects concern the important boundary line highlighted in the last chapter – that between the identification of a loss (as a detrimental event) and the assessment of the appropriate damages sum (by reference to the detriment). On the diminution in value model, for instance, the duration and severity of a loss were central and in-built ideas; the key boundaries for defining the extent of the impact of the wrong (and so value lost). They could be dealt with very naturally, without ever needing to label them explicitly as identification or assessment issues given the blurring of those two enquiries. That ease does not hold on the detrimental event model, with a binary event seemingly unresponsive to these ideas, even though they seem relevant to a satisfying identification and labelling of the loss. As a result, the following section will consider what it might mean to talk about these ideas as facets of a personal loss, and how the framework might be moulded to be responsive to such intuitively important considerations.

The chapter will begin with the severity of an injury (4.II), then move on to consider its duration (4.III), before asking how the particular case of the exacerbation of a pre-existing injury or worsening of a pre-existing detriment might be encapsulated (4.IV). A practical example demonstrating the interaction of these elements will follow thereafter

(4.V). Finally, the chapter turns to consider how the special case of death must be dealt with (4.VI). It will be shown throughout that the personal loss solution sketched in chapter three can coherently accommodate these complexities in making useful and defensible loss identifications. It should be noted at the outset that this chapter focuses specifically on personal injuries (including psychiatric harm) as the best expression of the particular issues involved. The discussion relates to losses for which we have thus far contemplated only a very general identification as a binary question (e.g. X has suffered a leg injury or X has not), but where this does not seem to exhaust our intuitive sense of the need to identify the loss. We should (and in current practice we certainly do) differentiate between a bruised leg, a broken leg, and an amputated leg. Physical and psychiatric injuries are clear examples. Other categories of loss, by contrast, seem sufficiently identified already. Consider, for example, loss of reproductive autonomy:¹ the coarse binary question already in view (reproductive autonomy or not) would seem to suffice to express the courts' intuitions about the relevant 'bad'.

Just as this thesis will not attempt a complete outline of the categories of personal loss and of particular personal losses recognised, it will not be necessary here to discuss each loss individually – the outline provided for the category of medical injuries below should serve as sufficient illustration.²

II. Severity

One of the most important potential obstacles to binary analysis is that we are faced with the nuances of rendering the event framework sensitive to varying injury severities. For a satisfying labelling of losses identified first and foremost by binary events, some account

¹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309. See chapter 3.II.3.c. Cf. generally chapter 1.III.3.

² At some points, particular references to other categories will be useful; where this is so, the extent of the reference will be explicit.

should intuitively be made not only of the kind of injury (leg or arm) but of its extent (amputated, broken, sprained). This will be followed in a later section by the similar, particular problem of pre-existing injuries which are, in the ordinary sense, worsened by a defendant.³ At the outset, it is worth stating that this section cannot be read in isolation from the discussion in chapter six on assessment. There the analysis will revisit the selection of binary event descriptors for loss identification in respect of its interplay with non-binary expressions of detriment (the scope of the implication raised by the event) for damages assessment.⁴

Discussion of grades of severity might look to be at odds with and undermine the binary identification framework behind which it would stand on the personal loss approach. To talk of severity on the new model will seem stranger from the outset than on a value model. On the traditional account, injury severity is often identified all too easily with the extent of a value loss (very severe injury – large value loss; only moderate injury – lower value loss), even though the severity of a personal injury cannot strictly serve as a proxy for it. This difficulty appears in the writings of Ogus⁵ and was discussed in chapter two,⁶ where the practical focus on injuries and the rhetoric of a dominant focus on effects were confronted. In short, given the variance between individuals and their experiences of the same injuries, there can be no precise equation of the injury with the effects experienced: a keen hobby sailor will confront extensive interference with her leisure experiences following a broken arm, an avid film watcher notably less so. Meanwhile practical necessity forces a focus on injuries, but the principle of full compensation of factual worse off-ness requires resort to all of the effects. In short, orthodoxy produces an awkward set of tensions.

³ Below, IV (and V).

⁴ See especially chapter 6.II.1.a.

⁵ See 'Damages for Lost Amenities: for a Foot, a Feeling or a Function' (1972) 35 MLR 1, particularly 6 ff.

⁶ See 2.III.1. Cf. chapter 1.III.1.

Regardless of the niceties of the precise interrelation of injuries or effects, it is clear, though, that severity is considered of paramount relevance, and this seems intuitively sound; whether we hone in on the injury itself or the changes forced on our lives by it (or both together), it seems right to differentiate e.g. a hairline fibula fracture from a debilitating compound fracture of the femur, rather than halt our identification process at ‘broken leg’. Moreover, if assessment provides a means for identifying particular value sums (only) within the confines of the particular losses identified (we cannot reopen loss events; that would undermine the analytical structure), then at least significant aspects of severity gradation will need to appear in identification if the framework is to be sensitive enough: identifying the loss as ‘injured leg’ and leaving all else to assessment of a value sum will not encourage the development of an easily-applied system, which expresses clearly the normatively important detriments involved, and which as far as possible circumscribes judicial discretion.

On the binary event approach as seen thus far, though, we might seem to be left with exactly the choice between a blunt tool (‘injured leg or no injured leg’) or the introduction of an additional, non-binary layer of identification which would undermine the approach. The aim in this section is to demonstrate an extent to which severity gradations can appear at the identification stage (and so lead to meaningful identification and labelling of the normatively important loss events) without compromising its structurally important binary nature. At the assessment stage in later chapters,⁷ we will see that further nuance in severity is then added behind and within those identified loss parameters to express the claimant’s detriment; adding texture to the loss idea. The detriment focused on for assessment is and can be non-binary; the event for loss identification cannot be. For its part, the present section must show that personal loss can incorporate some sense of the extent of bodily injury without stumbling through that functional division and without

⁷ See chapter 6.II.1.a.

introducing similar difficulties to traditional ‘non-pecuniary loss’ over the question of what it is exactly that we categorise through ‘severity’.

Personal loss on the event framework outlined in the preceding chapter consists in events whereby an implication is raised which is incompatible with the existence of the claimant’s protected personal interests (i.e. the event is ‘detrimental’ in the sense outlined). Given that an event, as a binary historical fact, cannot happen ‘more’ or happen ‘less’, it is perfectly clear that any notion of severity or extent of the loss must relate primarily to the element of detriment. Any notion of severity will be related to the extent of incompatibility raised; the seriousness of the tension between what the event implies about the state of the claimant’s interests and the reality of her interests. Given that this would appear non-binary, this implies that a full severity analysis can only be an assessment question, not identification. The extent of the incompatibility, though, can be seen to be roughly co-extensive with the severity of a physical injury insofar as the extent of the injury will roughly delineate the parameters for the implied claim thereby made about the state of the claimant’s interest in bodily integrity. Similarly, the extent of pain or distress will be coextensive with the extent of the detriment insofar as it is this which frames the implied claim about the claimant’s interest in emotional integrity. The specifics of that claim require a more fine-grained, non-binary analysis of the detriment to the claimant, but it is the injury itself which places us in (indeed constructs) the right ‘ballpark’, and the implied negative claim about the claimant’s interest can only be understood in the context of the injury caused.⁸ In this way, the injury identified does already serve as a rough proxy for the ‘extent’ of the personal loss. This is in marked contrast to the confusion with ‘non-pecuniary’ analysis where injury in no way necessarily expressed the change effected on the life of the claimant.

⁸ For further discussion, see chapter 6.II.1.a.

To summarise then, losses identified as binary events define a region of incompatibility with the claimant's interest. The precise contours of that region are defined in a non-binary way at the assessment stage, but in order for there to be sufficient variation in the regions to produce a practicably workable and normatively satisfying system, those loss events must be identified with some reference to severity built in. In the alternative, a very wide assessment discretion will be left to the judge assessing the issue and the injury will not be labelled recognisably. For the proper practical recognition and response to a loss, it must have a suitably accurate label attached ('leg injury' is for instance no adequate label) and too broad a discretion opens the door to inconsistency and excessive arbitrariness (the separation of sprained ankle, broken fibula, broken femur etc. hem in discrete areas for discretion in assessment, rather than leaving open an all-encompassing expanse). The question is then in what form injury events can be given basic severity descriptors expressing gradations of incompatibility with an interest that is compatible with a binary identification process.

As with the duration issue below, the answer proposed here must be that this judgment will take the form of a basic, qualitative assessment. This will be guided in respect of severity by medical opinion and the practicalities of assessing and differentiating particular varieties of injury. Something of the approach is already seen in practice – we have discussed how damages decisions tend to be categorised first and foremost by the relevant injuries involved, and now we must note that injuries are described in broad-stroke qualitative terms as far as severity is concerned. This has been the approach of the Judicial College's Guidelines in summarising practice under the current framework. In the context of neck injuries, for instance, that guide identifies current court practice as referring to 'severe', 'moderate' and 'minor' (each with three sub-grades) forms of neck injuries.⁹ That

⁹ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), § 7.A (p 36 ff).

basic categorisation process in this way introduces an element of severity recognition without resort to a continuous, quantitative scale. The personal loss framework can adopt a similar approach by treating each severity descriptor as defining a separate event (e.g. severe leg injury, moderate leg injury, minor leg injury), rather than relying on the secondary, assessment question ('how detrimental?') on a blunt, primary, loss event description (e.g. 'leg injury'). That structural shift maintains the integrity of the system of binary historical facts.

Severity gradations of this sort are also already operating in practice with sensitivity towards the practicalities of severity recognition for each particular kind of injury: not all categories of events require the same level of structuring and precision. The same will be true on the detrimental event framework. There is, for example, a relatively simplistic set-up for the severity of (already quite precisely identified) vibration white finger,¹⁰ whilst there are a multitude of recognised degrees of infertility¹¹ and back injuries,¹² for example. As one might expect, these severity gradations can also vary with time and more gradations become recognised where appropriate – in the case of back injuries, for example, the structuring in the seventh edition of the Guidelines was much less refined than that in the present edition.¹³ On the personal loss framework, this is straightforwardly an example of how new events can be added to the canon as discussed in chapter three.¹⁴

Decisions made in this respect would need to rely heavily on testimony from medical experts (supported by any and all relevant further evidence¹⁵), but there is nothing new or controversial in that proposition – the opinion of expert witnesses has been accepted by the

¹⁰ Ibid, § 7.J (p 56 ff) – minor, moderate, serious and most serious, with no subdivisions.

¹¹ Ibid, § 6.E, F (p 28 ff).

¹² Ibid, § 7.B (p 39 ff) – severe, moderate and minor, each subdivided into 2-3 grades.

¹³ Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (7th edn, OUP 2004), § 6.B.

¹⁴ Chapter 3.II.3 and cf. (in respect of duration) below, III.

¹⁵ See, for example, the recent *Ali v Caton* [2014] EWCA Civ 1313; [2015] PIQR Q1, where an attempt was made to undermine expert evidence by reference to the claimant having passed a citizenship test shortly before trial; a fact argued to be inconsistent with the level of cognitive harm revealed in the medical evidence. The Court of Appeal found the trial judge was correct to consider all of the surrounding evidence.

courts since at least the late eighteenth century¹⁶ and, in any event, the provision of a medical report and the use of medical evidence to evaluate the extent of injuries in a personal injury case is perfectly standard. *Brown v Hamid*, discussed further below, already provides a good example. Paragraphs 16-37 display Baker J's dissection of the medical evidence, drawing on e.g. the submissions, the results and changes from joint expert meetings, the confidence and credibility of the experts as witnesses etc. to come to clear and sensible conclusions on the factual matrix.¹⁷

Having proposed a qualitative severity categorisation along these lines, it is not unreasonable to go on to question why in fact one should not produce an increasing number of divisions to the point where the effect would essentially create a continuous scale of severity divisions rather than the discrete gradations contemplated. The potential problem is clearer still with the temporal facet to injuries below.¹⁸ The answer is both practical and conceptual. Considerations of ease and simple possibility would militate towards the more limited categorisation – any answer is necessarily an approximation and attempting very precise identification is not a credible technical process; it is much more holistic guesswork. It also, moreover, reduces the level of discretion and uncertainty created by inviting a judge to pinpoint a very specific value as loss if some basic channels or descriptors are in place. It is also important to note that the precise identification of the injury (and thus completion of the identification process) against the backdrop of recognised injuries in guideline listings and previous decisions is made by the judge, not a medical professional, albeit with the aid of (potentially very extensive) medical professionals' evidence. It is thus again not, to that extent, a technical process of refined

¹⁶ See e.g. *Folkes v Chadd* 99 ER 589; (1783) 3 Doug KB 157. Cf. in re expert consultation on assessment sums *Davis v Foliot* 82 ER 735; (1651) Sty 310. Cf. David Ibbetson, 'Tortious Damages at Common Law' in Gamauf, R (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Manz Verlag 2017), 102.

¹⁷ [2013] EWHC 4067 (QBD).

¹⁸ Below, III.

identification, but a much more impressionistic idea. Such a holistic approach would seem overburdened where it is asked to select too precise a descriptor.

Severity can in this way be accounted in the personal loss identification framework such that the binary focus on (non-)occurrence of a loss event is not compromised. The key is to treat severity as a quality of an event, not a quantity value, and one described on the basis of practicality and medical evaluation. There is a complication in the delicate interaction between the inclusion of severity elements in identification (such as to lead to useful grading, labelling, and identification normatively) and a proper accounting of the (non-binary) extent of the detriment idea (such as to arrive at an appropriate damages sum within the assessment enquiry). That boundary, and the non-binary detriment assessment, will be considered again in chapter six.

III. Duration

The second example of intuitively relevant information which deserves consideration here is thus the temporariness or permanence of injuries. Whereas state-based loss ideas using a quantitative analysis are inherently reactive to the time span over which the claimant experiences the effects which are its subject, this is not clearly true on an event-based account. Events are perhaps most naturally understood as discrete instances in time, and so it is necessary to explain how events here can be (as they rightly should be to at least some extent, following our general intuitions about losses) accommodating of temporal concerns.

The first stage of that explanation is to consider the possibility that certain kinds of event can be ‘continuing’. The idea of a continuing event is not unintuitive, and it is clear that in other contexts the law has recognised a lasting temporal facet of different occurrences – perhaps the most recent (albeit controversial) attempt can be seen in tort,

with Lord Toulson's approach to the scope of employment in vicarious liability focusing on an apparently 'unbroken sequence of events'.¹⁹ The really critical question to consider is how definition could be given to that duration in the personal loss context. It cannot simply be a historical question of whether or not (for example) a wound heals or how long an impediment lasts, because in that case it is possible that the event would not be fully identified at the point of claim (because, for instance, a wound is still healing when the claim is brought). Instead, it is necessary to make reference only to qualities of the event knowable at the point of its first beginning.²⁰ This could be achieved with a basic prognosis assessment on whether the continuing event is of a time-limited or permanent *kind*. For a physical injury, that is a relatively simple question of looking to the medical prognosis (cuts heal, amputated legs do not) and we can easily imagine a few rough categories to make a start – short-term continuation, long-term continuation and permanent continuation, for example. As with severity, there would be heavy (but unproblematic) reliance on the testimony of medical experts here, supplemented by any other relevant information.

Any framework of recognised losses would also need to be flexible in this respect, though, in order to account for changes in medical understandings and the ever-evolving state of the science. This is likewise unproblematic where there is judicial control over the identification process (and it is not ossified in a statutory form, for example). In the hands of a judge, an injury can be classified on the basis of current science (e.g. a new treatment for an injury rendering the recovery period shorter means the identification process in cases after that point will reflect that; the expert evidence will identify injury X as [for example] a short term injury where in earlier cases the same kind of injuries X were

¹⁹ *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11; [2016] AC 677, [47]. Cf. in criminal law, the *actus reus* as 'continuing act' in e.g. *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; consider also contractual interpretation – s. e.g. *Caudle v Sharp*, *The Times*, 8 March 1994 (multiple occurrences interpreted as a singular continuing act).

²⁰ Cf. also chapter 6.III, IV.2 showing the outworking of likely duration as characterising an event in the present, though the duration stretches in fact into the future.

identified as a medium term injuries). Amendments or new introductions into the recognised temporal grades can easily be made – any table or guideline is descriptive rather than normative²¹ and the same applies here as in the preceding chapter in the context of the introduction of new varieties of loss events. Where claimant A suffers an injury to her leg which is unusually long-lasting, and previous practice has only seen such an injury identified as lasting a short while, the court is free to accept a novel long-term form of the injury. This would of course serve as a precedent for future claimants coming to identify their injuries in a statement of claim under the detrimental event analysis. Other kinds of loss events will of necessity be permanent (and thus require no gradation at all); loss of congenial employment would be an obvious example, with the entire premise of the award requiring that the claimant would not be able to enter into or return to the satisfying occupation desired or previously enjoyed.²²

Prognosis is not, of course, a certain creature, but an evaluation on the basis of medical experts, the basic facts and experience. This lack of precision is not generally problematic, however, and is already recognised in the personal injury context in respect not only of prognosis, but of severity.²³ It is clear that we can only ever deal in more or less rough approximations (reflected on this framework in the more or less rough-hewn categories) and the system must simply react and develop with the state of the medical science. If a medical expert is only able to make very loose statements as to an injury's likely duration, a judge can only react to identify the injury accordingly; the framework presents no important change in that respect from the difficulties currently faced.

²¹ So much is explicitly clear for the current Judicial College Guidelines, for example, which work in a way similar to the present proposal – see Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), xii.

²² On loss of congenial employment as a personal loss generally, see chapter 3.II.3.c.

²³ See e.g. Deirdre Dwyer, *The Judicial Assessment of Expert Evidence* (CUP 2008), 149 f. For recent judicial recognition of inherent imprecision, consider *Ali v Caton* [2014] EWCA Civ 1313; [2015] PIQR Q1, [42] ff (McCombe LJ), accepting the trial judge's presentation of many evidence sources and note on the 'imperfect understanding' of the medical profession in respect of brain injury. On severity, cf. above, II.

There are, however, cases where it is certainty which in fact raises a particular difficulty: events subsequent to the commencement of a loss event can affect its temporal duration. Thus, for example, a claimant may have a broken tibia for which her doctor can only estimate the healing period at four to six months. If the claimant's leg for some other reason is amputated after three months, then the duration becomes certain insofar as the tibia fracture disappears at three months. This sort of constellation could be dealt with in numerous ways by the event analysis, and the options will be analysed here by comparative reference to the *Baker* and *Jobling* decisions. It will be recalled that in the former of those cases the claimant suffered a leg injury in a road traffic accident; later, he was shot in an unrelated incident and this ultimately necessitated the amputation of that leg. The House of Lords decided in favour of the claimant receiving damages from the tortfeasor in the car accident for the leg injury calculated so as to disregard the loss of the leg; that the injured leg was no longer there should not, so the court, result in the claimant's award being reduced.²⁴ The *Jobling* case, meanwhile, concerned an industrial injury caused through a breach of statutory duty which impaired the claimant's ability to work. Before trial, the claimant developed (naturally, non-tortiously) an unrelated disease of the spine which left him unable to work and as far as damages assessment was concerned, the House did, in spite of *Baker*, take account of this supervening detriment.²⁵ (The claim of interest in the House of Lords concerned the pecuniary loss of earning capacity; the personal elements of recovery were not superseded by the independent illness and so no appeal was made against an award which continued past the naturally-developed illness.²⁶ The same argument should apply, though, where personal harm is superseded.²⁷)

²⁴ *Baker v Willoughby* [1970] AC 467.

²⁵ *Jobling v Associated Dairies* [1982] AC 794.

²⁶ See *ibid* and cf. the Court of Appeal judgment: [1980] QB 389.

²⁷ Robert Stevens, *Torts and Rights* (OUP 2007), 74 f misses the lack of causal relationship between the loss of amenity following the tort and the natural illness and is thus incorrect in his interpretation that the divergent treatment between earnings and amenity results from the loss of amenity award being substitutive for a right (and so assessed only as the value of the right). Duration did and does matter as a characteristic of the loss event.

These are treated as causation cases generally, and difficult causal questions remain, but it will be seen here that at least some of the work in resolving them can be done by loss ideas; that loss has thus far played a relatively minor part is typical of the underappreciation of the normative content and importance of the loss concept, and a lack of critical engagement with it. For the discussion to follow, suppose as an example a similar situation where an initial physical injury has occurred to a claimant's leg (which comes to the claimant as a detrimental event caused by a defendant). The medical evidence suggests that at the point of the occurrence of that injury it should be viewed as (*prima facie*) permanent. Before trial, a subsequent incident results in the total loss of that leg and so completely supersedes the first injury. What is to be done at trial for the tort which caused the initial leg injury?

As a loss decision, we could on the one hand hold to the 'initial' identification (i.e. judged from the point of commencement) of the event as permanently continuing. In that case, recovery would persist beyond the occurrence of the second incident. The result would thus be comparable to the eventual result in *Baker*, and in fact with far more intuitive appeal than, for instance, Lord Reid's analysis in that decision. His Lordship's argument rests on a slightly odd assumption that the effects of the injury continued to arise beyond the existence of the injury itself, rather than, for instance, only parasitically on the injury (or some residual aspect of it) which caused them.²⁸ The argument seems to boil down to the logically invalid idea that because the first injury caused difficulty walking, and the claimant currently has difficulty walking, then the first injury must still be an operating cause. Lord Reid's analysis is, it is submitted, in this respect a classic expression (emerging through causal thinking) of the weaknesses seen in dealing with the loss

²⁸ *Baker v Willoughby* [1970] AC 467, 491 f. Lords Guest and Donovan and Viscount Dilhorne agreed without comment.

concept.²⁹ (If his Lordship is nevertheless thought correct, of course, then the first injury is not superseded and the decision does not match the hypothetical currently being discussed; the discussion here relates to aspects of the reasoning which bear on the situation where the injury *is* fully subsumed³⁰).

On the other hand, the subsequent event could be accounted through use, at the trial of the first injury, of the full medical information available in light of the later change. On that basis, an assessor would decline to identify the first event as of a kind which is permanent. The subsequent injury will represent the end of the first event – effectively downgrading it to, let us suppose, a short-term continuing event (where and because the time between the entry of the loss events was short and the first event thus lasted only a short time). The defendant would then be liable for the first event as a short-term continuing event. The result on that analysis is structurally comparable to the result in *Jobling*, leaving aside any potential distinction between tortious and non-tortious supervening events.

On that last point, it should be clear that the personal loss analysis proposed cannot differentiate between natural events and tortious ones in selecting a solution from those presented, even if that appears to be the law's current position. It is, as noted throughout, central to the framework that the identification of loss is recognised as an independent enquiry involving isolating detrimental occurrences.³¹ The only relevant questions here are whether an event has occurred and whether it is detrimental in the sense suggested – neither of these is sensitive to whether there is a wrong at root insofar as the notional observer looks to the claimant as she experiences the detriment and not to the

²⁹ This is exactly why Ogus is right to lament a lack of engagement with the distinction between injuries and effects; see chapters 1.III.1 and 2.III.1.

³⁰ And if Lord Reid is in fact correct that the injury is still operative, it would still seem to be straightforwardly correct on the new personal loss analysis to hold the first tortfeasor liable beyond the second tort and resolve any residual difficulty as a question of apportionment between the two tortfeasors.

³¹ Though note that in the assessment process a non-binary analysis operates as regards the implication raised by each event. See chapter 6, especially at 6.II.1.a.

tortfeasor/other causative agent.³² A loss can still be a loss when caused entirely innocently (it will simply not even arise for discussion unless there is a wrong to establish a liability). There are also numerous practical difficulties which would equally militate against making an answer in such cases dependent on whether or not the subsequent event is tortiously caused, not least of which is the concern that the court would have to make a liability determination on a claim not before it and thus potentially without e.g. relevant witnesses.³³ These issues were noted in *Jobling*, albeit that they were not seen as sufficient to allow the court to do more than raise concerns over the reasoning and result in *Baker*.³⁴ If any relevance is placed on the distinction between tortious and non-tortious causes then the loss issue also bleeds conceptually into both the question of its causation and, ultimately, questions of duty, breach and even damage insofar as these are necessary to establish whether there is a tort. It would not be possible to identify a loss without already knowing its cause, despite the question of its being caused representing a logically subsequent issue. One would be left to ask whether a putative loss is tortiously caused and then (improbably) withdraw the designation as loss if and when causation by ‘not-tort’ became clear.

These weaknesses abound in the traditional analysis of the problem in the case. It is submitted here that focusing on the existence and identification of loss reduces both the burden on the causal analysis and provides better reasoning towards a solution. This is not the first arena in which reasoning about cause may be said to have strayed too far and into territory rightly covered by damage or loss concepts.³⁵ Resolving these situations where subsequent events are relevant to categorising a continuing event in the loss-focused

³² This is also concordant with declining to account for the defendant’s fault in assessing a damages sum in response; see chapters 5.V.2.g and 1.IV.1.b.i.

³³ The issue is considered below in this section in respect of the solution proposed here.

³⁴ *Jobling v Associated Dairies* [1982] AC 794, 816 (Lord Keith); according to Lord Bridge, it is not at all clear that Lords Reid or Pearson rested on or intended to create such a distinction in any event (ibid, 817).

³⁵ See e.g. Jane Stapleton and Sandy Steel, ‘Causes and Contributions’ (2016) 132 LQR 363, 367 (Case commentary on *Williams v The Bermuda Hospitals Board* [2016] UKPC 4).

manner discussed, though, requires only one solution from those above. It is submitted that the second result is preferable; it appears to better match the reality of an injury being subsumed and accords well with the rule that a court must not speculate about facts when they can be known.³⁶

We do then still need to find an answer to the argument, of great concern in *Baker*, that where the second event is tortious, there is an apparent ‘gap’ if recovery against the first tortfeasor only covers the loss until the second tort occurs, because the second tortfeasor is said only to be liable to the extent that the first injury is worsened, rather than for the full harm now experienced by the claimant. On the question of how the personal loss analysis can deal with ‘worsening’ of a pre-existing injury in general, there is discussion below.³⁷ As for the supposed ‘gap’ where the first defendant’s liability ends, it is suggested that a better solution exists than to hold the first tortfeasor still liable for a loss event no longer operative. That solution is to see the reduction in the sum obtainable from the first tortfeasor as a new form of pecuniary loss caused by the second tortfeasor. That is to say that the second tortfeasor would be liable for the pecuniary and personal loss arising from making the injury worse and an additional pecuniary loss arising from *reducing the value of the claim* which would otherwise have been had against the first tortfeasor. In the basic example outlined above, then, the first tortfeasor is liable for (associated pecuniary losses and) the personal loss in injury to the leg with a short-term (from its first arising until it is subsumed by the loss of the leg) duration. The second tortfeasor (having caused the total loss of the leg) is liable for (associated pecuniary losses and) the personal loss in the removal of the leg as a worsening of the prior injury³⁸ and an additional pecuniary loss equating to the difference between the award received from the first tortfeasor for short-term continuing leg injury (the loss the claimant is held to have suffered from the first) and

³⁶ See e.g. *Curwen v James* [1963] 1 WLR 748 and cf. the discussion in *Jobling v Associated Dairies* [1982] AC 794, 802 f (Lord Wilberforce), 807 f (Lord Edmund Davies).

³⁷ At IV.

³⁸ On which, again, see below, IV.

that which would have been received if the first claim were to have proceeded presuming a permanent leg injury (which the loss from the first tort would have been had its continuation not been cut short by the second).³⁹

Such an analysis was rejected by the House of Lords in *Baker* itself on the basis of remoteness,⁴⁰ though it had been accepted in the Court of Appeal without a hint of reservation.⁴¹ The thrust of Widgery LJ's discussion there seems intuitively sound on the remoteness point, resting comfortably on the thin skull rule: 'In meal or malt [the claimant] had the equivalent of a good leg' and the defendant must take his victim as found.⁴² It should certainly be perfectly clear that if A injures a physically disabled B she will affect B's entitlements to money just as she would affect B's earning capacity. Whilst this might usually mean that A causes B to receive more support in making B's disability more serious (and tend to reduce earning capacity), eradicating an injury by her negligence will mean a loss to B under that head. Similarly, the line of 'vicissitudes' reasoning (seen in the *Jobling* judgments where they create room for *Baker* to survive⁴³) which rests on an understanding that torts, unlike natural events, are not foreseeable vicissitudes (and also thus that the rule that a court must not treat as uncertain what has been made certain by events need not be applied in cases like *Baker*) brushes aside some important points. It is in theory clear to the second tortfeasor that her victim is physical impaired – is it still not foreseeable that the victim might have been tortiously injured and so have a damages claim? It is submitted that there is a difference between assuming that people will avoid

³⁹ There may still be a causal under- or over-determination problem in respect of the pecuniary loss for reduced claim value (though see Achas Burin, 'What does it mean to suffer loss? *Haxton v Philips Electronics*' (2014) 77 MLR 983, especially at 997 f). Either way, however, the analysis supported here gives a better, clearer analysis of the loss structures in terms of identifying and separating them and clearly confines the causal question to its proper place (following a primary loss identification question).

⁴⁰ *Baker v Willoughby* [1970] AC 467, 495 f (Lord Pearson).

⁴¹ *Ibid*, 480 f (Widgery LJ).

⁴² *Ibid*, 480. Cf. Fenton Atkinson LJ *ibid* at 482, Harman LJ at 483. The Court of Appeal judgments each hold that the first injury is subsumed (in contrast with the intuitively uncomfortable injury analysis later used by Lord Reid) and maintain that the victim must simply be taken as found.

⁴³ See e.g. *Jobling v Associated Dairies* [1982] AC 794, 813, 815 f (Lord Keith).

negligent behaviour in future and assuming no one has been negligent in the past where an injury has already occurred.

A similar solution to that proposed above (that any gap in recovery is explicable as an additional pecuniary loss caused by the second event) has in fact been accepted post-*Baker* in other contexts. An example given by Peel and Goudkamp⁴⁴ is *Haxton v Philips Electronics*.⁴⁵ Here the court faced a claim by the widow of a man who had died from mesothelioma caused by negligent exposure to asbestos by his employer. The widow had also then contracted mesothelioma as a result of exposure to that asbestos via her now-deceased husband. This reduced *her* life expectancy and, with it, the value of her claim against the employer under the Fatal Accidents Act 1976 (for the negligently caused death of her husband). The widow was able to claim the reduced value of the statutory claim as a pecuniary loss. In the light of this developing jurisprudence on accounting damages for torts which decrease the value of another claim,⁴⁶ we have another reason to doubt those criticisms of limiting the first tortfeasor's liability on the basis of a 'gap'. Peel and Goudkamp's examples where the argument has held are fatal accident cases and cover a number of varieties of claim, but there is no reason that this should be critical; the core issue is surely that in those cases, unlike *Baker*, it is a defendant being sued in respect of the *later* injury. On the facts of *Baker*, it would be difficult to imagine that a court, if in fact faced instead with a claim against the tortfeasors responsible for the robbery (the second tort), would really have created a 'gap' in the first place. It could not be clearer from Lord Pearson's judgment that the decision represented a pragmatic urge to compensate the claimant as much as possible with the present defendant,⁴⁷ with the result

⁴⁴ See e.g. W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), paras 7-011 f to that effect, with further references also there.

⁴⁵ [2014] EWCA Civ 4; [2014] 1 WLR 2721.

⁴⁶ This may also be compared with a trend of increasing claims against solicitors for undersettlement of personal injury claims which has been noted by some observers – see e.g. C. Neale, 'Cannibalism in the Legal Sector' (2015) 159 (12) *Solicitors Journal* 29. The value of claims is seemingly a detriment on the move.

⁴⁷ *Baker v Willoughby* [1970] AC 467, 495.

having the potential to corrupt loss thinking (as well as causation). That should be resisted in the present outline of loss identification.

One final note must be made on the potential problem that a claimant might bring a claim in respect of the second injury before a claim in respect of the first. With no judicial determination of the first tortfeasor's liability, a pecuniary loss of the sort proposed does not seem to exist. The problem and solution are essentially procedural, though. A provisional damages award could deal with it insofar as, at the trial of the second injury, the claimant will have medical records etc. to demonstrate that the loss might develop (through completion of the litigation against the first tortfeasor). She could thus secure an award which excludes this loss provisionally, but allows the claimant to return for reassessment.

The digression here into these traditionally causation-focused cases has been long, but on the basis of these arguments we can come to a decision as between the options on intervening injuries and the accounting of duration. We could recognise that a second event changes the nature of the injuries or else ignore that a change has occurred and hold to a mere prognosis finding on the first injury seen in isolation. For the reasons articulated above, the former seems preferable. The final caveats to be noted here are that this accounting of duration might seem to introduce a linear quantity and so undermine the purely qualitative expression otherwise given to personal loss events⁴⁸ and that there might be difficulties in establishing sensible duration categories for an event. On the first point, the critical issue to bear in mind is that this one linear dimension is an insufficient basis to establish any numerical description of the events concerned as a whole. It only introduces one potential numerical facet to the event, thus inviting comparison on a numerical basis only (if at all) between otherwise identical events and in that one respect. In this way, relatively little weight could be placed on that aspect, with the result that, even if one

⁴⁸ Cf. chapters 3.II.1 and 2.II.2 on (non-)quantitative identification.

argued that event identification were not *purely* qualitative, a singular quantitative strand would only have a limited and appropriately constrained significance.

The categorisation of events temporally into a framework of pragmatic divisions as suggested above, though, is intended to deny precisely that point anyway. Broad groupings of (e.g. short or long-term, or permanently continuing) events would serve to deny even that limited introduction of numerical scale. The important question, which is the second and related issue noted, is the potential for those groups to be defined ever more precisely, to the point where any distinction from a numerical expression of the length of time the event lasts is meaningless. This is prevented, however, in part by the limitations of our foresight and ability to prognosticate on loss events through the future, and in part by the pragmatic need to resort to the broader form of category to express the idea in a functionally useful way. Any expression of the length of time an event lasts would necessarily be an approximation anyway – all the more so where, for example, pain is intermittent. Equally, no form of more refined approximation of time would seem usefully more reliable, or in principle any better than the broader category ideas, with those otherwise equivalent situations where the court would rely only on a prognosis for duration. The categories chosen relate, therefore, to the particular practicalities of evidence and description with particular events.⁴⁹

Demonstrably, then, duration can be accounted in the personal loss identification framework in such a way that the binary focus of the event aspect is not compromised, but a normatively satisfying labelling of the loss is achieved. The key is to treat (likely) duration as a quality of an event, not a quantity value. In assigning and identifying those quality ideas, reliance can and must be placed on analysis of the medical evidence and decisions must be reactive to medical developments.

⁴⁹ The argument is fundamentally the same as for severity descriptors discussed above, II.

IV. Pre-existing injuries and acceleration

It is now time to consider the issue of how to deal with situations where an older, pre-existing injury is made worse, or where some portion of injury would be suffered anyway but later. Once again, on the dominant approach, these ideas are unsurprisingly not problematic beyond the deeper-rooted conceptual difficulties with a comparative identification of lost value. Given that loss is identified entirely in terms of the differential between two states – that in which the claimant found herself after the tort and that in which she would have been but for it – the pre-existing or hypothetical-alternative extent of injury presents no separate question; it is simply accounted in the construction of the counterfactual state.⁵⁰ It is also not difficult to see how tables of previous damages awards and guideline figures (both framed on descriptions of injuries and effects) could be manipulated along those lines to facilitate identifying value given the pre-existing extent of an injury. To give just one example from practice, in the case of *Maiden v Rock*⁵¹ the claimant was involved in a traffic accident and thereafter suffered inter alia from back pain. He already had a history of lower-severity back problems and, by a medical assessment of his past and current pain experience, the expert evidence attributed 50 per cent of the symptoms to the accident and estimated a return to the condition's pre-accident severity at 12 months. Damages were assessed on the basis of these figures.⁵² The Judicial

⁵⁰ Cf. e.g. *Smithurst v Sealant Construction Services* [2011] EWCA Civ 1277; [2012] Med LR 258, [9], [16] (Moore-Bick LJ), on different approaches to constructing the counterfactual in these situations. Each is equally valid as a matter of evidence and causation; there is no additional loss problem.

⁵¹ [2015] CLY 1919. For a similar example including the same percentage attribution analysis for psychiatric harm (30 per cent of a depressive illness attributed to a traffic accident following exacerbation), see e.g. *Lee v Davies* [2012] CLY 2420.

⁵² General damages of £3,900 were awarded, encompassing the back pain and various other injuries. The pecuniary loss in the case also highlights the important causal aspects of the question – physiotherapy costs were *not* reduced in accordance with the 50 per cent figure, because in his pre-existing condition the claimant did not (need to) undergo physiotherapy.

College's Guidelines accordingly also make reference to various levels of injury severity equally applying to exacerbation or acceleration forms of the loss.⁵³

The event model, however, does not take cognisance of pre- or post-existing states, meaning a little more thought is required about how that framework will respond where a condition is made worse or accelerated. If it is incapable of responding, then this will of course have serious, problematic implications. An injury might, for example, effectively be treated the same as if it were entirely new regardless of whether it was in fact only an exacerbation, or else entirely old regardless of the deterioration. That would have the potential to produce a gross over- or understatement of a claimant's detriment. It would also completely alter any analysis of supervening injuries as discussed above in section II – producing a very different (if straightforward) answer to whether there was a recovery gap. For acceleration the answer is simple – loss events are still subject to the (separate) requirements of causation and if in the hypothetical alternative the same event would have occurred for a given period, then the loss event is to that extent not caused by the wrong. There will be no recovery for it; damages will be assessed by reference only to the detrimental event insofar as that detrimental event is actually caused by the wrong. Deterioration is more complex.

One possible resolution would be simply to see the incidence of deterioration as events in themselves, comparable straightforwardly with the incidence of new injuries. This would entail judicial recognition of 'worsenings' as separate events (with any compilation of the canon of losses framed accordingly). This would seem to result in enormous multiplication of the number of recognised events the system would be concerned with given the really very large number of permutations possible. Alongside e.g. minor, moderate and severe forms of back injury, the courts would separately recognise

⁵³ See e.g. back injuries at Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), §7.B.c.i and ii (p 41 f).

something like a ‘slight exacerbation back injury’ (where a minor injury pre-existed and this deteriorated to a moderate one, or an injury progressed from moderate to severe) or a ‘serious exacerbation back injury’ (where a minor injury deteriorated into a severe one). Where there are potentially dozens of severity grades, the permutations could increase unreasonably. This solution is also not particularly appealing conceptually, given that it strays very close to the recognition of a change of state, albeit that the focus is still on an occurrence rather than the differential produced by a state change. A similar issue arises with Hanser’s concept of harm (as a ‘loss’ of basic goods), discussed in chapter three, and Hanser sees this as unproblematic for him insofar as it is the incidence of loss of goods, not the state-change which loss of goods entails which occupies his attention.⁵⁴ This same argument could easily be made here; we would still be focusing on the fact that a deterioration or exacerbation has happened to the claimant, rather than on the fact that what has happened to her ‘worsened’ her. Nevertheless, the potential for confusion is great and the simplicity of the system of loss recognition and descriptors is lost.

Another approach is possibly less intuitively obvious, but would seem to be functional and not unduly increase the number of events needing to be recognised as losses. The critical difference from the solution above lies in how the injury (and any description of it) is framed. It involves seeing the gradations of injury much like Russian dolls; treating each serious injury as subsuming a moderate and minor form of the injury. Every injury would be understood to escalate through the degrees of severity as it developed, and each degree would be viewed as a figure stacked around the lesser forms. Pre-existing injuries take the form of figures which came into being before the wrong and which are therefore not referable to it: though they can be identified as loss events in themselves (which end at the

⁵⁴ Matthew Hanser, ‘The Metaphysics of Harm’ (2008) 77 *Philosophy and Phenomenological Research* 421, 443.

point they are superseded by the greater injury⁵⁵), they will not have happened as a consequence of a damaging breach of duty and so will fail ultimately to be causally attributable to the wrong. ‘Worsenings’ are accounted insofar as a higher degree (a larger doll) is nevertheless recognised for the relevant period.

Consider as an example an injury framework where three grades of severity have been recognised by the courts for harm to an index finger – severe, moderate and minor. Now suppose that a pre-existing moderate index finger injury to C (caused in a different accident some years before, and before which the finger was healthy) is made worse, leaving a severely injured finger, by an accident caused by D’s negligence. At the point of drafting the statement of claim, C must proceed through a variety of essentially tick-box questions. Question one runs along the lines: has a minor (including one which [immediately] proceeded to a more serious) injury to the index finger occurred. The answer to this would be no for present purposes – the minor-severity ‘part’ of the injury arose long before (contemporaneously with the moderate-severity ‘part’) and so this will not fall within the claim (if it were included it would be identified as a loss but fail thereafter at causation) and will not be included in the drafting. Question two would ask much the same for the moderate level of injury, and again the answer would be no for the same reason. Finally we would come to a third question and ask after the incidence of a severe injury, to which the answer would be yes. Understanding the severity graded injuries to relate to one another in this way, and asking about occurrence in the requisite way, thus facilitates an account of pre-existing injuries which maintains a commitment to non-comparative identification. It will be clear from the example that, despite it forming no item of loss relevant for the immediate claim, the pre-existing injury must still be analysed in order to complete a proper identification of the relevant losses: in order to answer the first two questions above, an understanding of the former injury as moderately severe is required.

⁵⁵ Cf. the discussion of duration above, III.

This is not problematic though, insofar as a court under the current framework likewise relies on analysis of the pre-existing injury to identify the comparative difference from the counterfactual situation and all of the necessary information will be before the court.⁵⁶

As a second example, where there is an entirely new serious index finger injury, meanwhile, the answer to all of those questions in the preceding paragraph would be yes (all constituting losses and ultimately being causally attributable to the wrong) – the claimant would ‘tick all of the boxes’ and claim each. What that ‘stacking’ means for the assessment and award of concrete monetary figures for each ‘doll’ in the pile will be discussed in the assessment section of this thesis.⁵⁷

Whilst this approach might seem strange at first, there is a certain underlying realism to it. If one imagines, for example, a new, serious finger injury once again and supposes that it was the result of the finger being crushed in a machine in an industrial accident, it is clear that there was an instant in which the injury was minor, becoming worse as the impact continued. Temporally, the escalation to other grades of severity might have been very quick indeed; it might have been practically instantaneous. Nevertheless, the fundamental fact that there was a moment in time, a form of *scintilla temporis*, at which there was a minor injury seems sufficient for an event analysis to engage. At this point, the solution here can be harmonised with the duration and severity analyses above – the phenomenon whereby the injury passes through grades of severity can be expressed in terms of the severity and duration descriptors, with the addition of a ‘transitional’ duration category for those circumstances where an injury proceeds near or effectively instantaneously to the worse grade. (Again, how this works itself out at the assessment of a damages sum is discussed in the assessment section). On that basis, instead of contemplating the addition of an enormous plethora of ‘worsenings’ as individual injury

⁵⁶ Unlike, for example, the situation discussed above (in relation to subsequent injuries and prognosis) with respect to analysis of *liability* for a prior incident, where inter alia a relevant tortfeasor would be absent.

⁵⁷ See chapter 6.II.1.d.

events, we can provide a more succinct solution, expanding the number of events relatively little by incorporating a transitional duration form of each.

Here we must digress, though, to the *Hicks* decision.⁵⁸ There a claim was made on behalf of the estate of two victims crushed in the Hillsborough football stadium disaster. No award was made for non-pecuniary loss on the basis that it was not established that any injury had been suffered aside from the deaths themselves. The sort of argumentation just employed looks very similar to the argument made by claimant's counsel to the effect that the process of being crushed in the stadium must have led to injuries which preceded the death of the two victims in question, for which it was argued a pain and suffering award was required.⁵⁹ However, the rejection of that claim is not fatal to the view of injuries proposed here. The questions in point there were, firstly, simply of evidential implications which could not be overturned on appeal⁶⁰ and, secondly, otherwise not related to loss, but actionable damage, which (as has been said multiple times) is functionally and definitionally distinct. Again, such a distinction is more evident and better articulated on the personal loss framework proposed.⁶¹ Whether anything in that horrifying course of events constituted loss is irrelevant until liability is established; liability requires proof of actionable damage which, as currently understood, requires proof of factual worse off-ness. If the courts consider there to be no such non-negligible state of being worse off prior to death, no action can vest. On the facts, the court attributed any pain by the deceased victims in *Hicks* to the process of dying (which cannot constitute damage to ground the action) and rested on the medical evidence that no other injuries (aside superficial bruising

⁵⁸ *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65; [1992] PIQR P433.

⁵⁹ *Ibid*, P435 f (Lord Bridge). Cf. also (in the context of the Law Reform (Miscellaneous Provisions) Act 1934) e.g. Paul Mitchell, *A History of Tort Law 1900-1950* (CUP 2015), 260 f, recounting inter alia A.L. Goodhart's editorial at (1941) 57 LQR 465 to the effect that there is no such thing as instantaneous death insofar as a *scintilla* of time will necessarily exist between injury and death.

⁶⁰ *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65; [1992] PIQR P433, 434 f (Lord Bridge).

⁶¹ See chapter 3.III.

which may have been inflicted *post mortem*) were inflicted than the fatal crushing.⁶² If damage had been found, on the presently proposed framework it would be easy to recognise a succession of transitional-duration losses prior to death, though the damages amounts would no doubt ultimately have been small.⁶³ This does seem strange to say – given the nature of the disaster, if there were a claim at all one might expect damages to be relatively large – but it must not be forgotten that the really jarring facet of the case was the conduct of the tortfeasors, an issue forming no part of the assessment of ordinary damages for the personal loss.⁶⁴

Nothing in this solution, meanwhile, should be thought problematic beyond the identification of loss question. In particular, viewing a loss in this stratified way will not have any necessary impact on the way in which the functionally separate question of actionable damage is viewed, as should already be clear from the discussion of *Hicks* above. Likewise, there are no important implications for duty or breach. Causation might give us pause for thought, particularly insofar as the stratified view of injuries is seen in light of the question of the divisibility of injuries for causation analysis purposes, or for the apportionment of damages. There is in reality no new difficulty, however, with each stratum of fundamentally the same kind. There is no additional implication regarding the injuries' divisibility involved and as for apportionment each stratum can be apportioned as required in an orthodox way.

Overall, as a consequence of this solution, the personal loss framework can apply equally well across instantaneous severe accidents, injuries being worsened in severity, and in fact the slow progression of disease. With the latter, the system presented can account very simply for the different periods of injury at different levels of seriousness.

⁶² [1992] PIQR P433, 435 (Lord Bridge).

⁶³ An issue of assessment related to the extent of detriment, again see chapter 6.II.1.d.

⁶⁴ To that effect, Lord Bridge: [1992] PIQR P433, 434. On fault as an assessment factor, see chapters 5.V.2.g and 1.IV.1.b.i.

V. Combining severity, duration, deterioration and acceleration: *Brown v Hamid*

In order to demonstrate the interworking of the elements above, it is important now to focus on a factual scenario which introduces predictable complexities. It is proposed here to focus, loosely, on a situation such as that in the *Brown v Hamid* case.⁶⁵ Mr Brown suffered symptoms of breathlessness over a period of several years which were indicative of various heart-health issues, in particular pulmonary hypertension. Ultimately he died from the effects of this in 2012 after several years in the care of Dr Hamid. His widow claimed damages for losses allegedly caused by a delay in 2007 in making a correct diagnosis of a pulmonary embolism and prescribing Warfarin. It was argued that the delay brought forward the onset of pulmonary hypertension by some years. The defendant contended (ultimately) that the only loss was an irrecoverable loss of expectation of life.⁶⁶ In the course of his fact-finding on the basis of expert evidence, Baker J established that there was a twelve month period during which Brown suffered the more severe symptoms where he would otherwise have suffered only mild symptoms and his expectation of life was likewise then cut short.⁶⁷ An initial point to note is that much of the discussion in the case, and in the solution proposed here sits together inseparably with counterfactual comparison to establish causation of the loss by the wrong. Nevertheless, the two ideas must be kept strictly separated – the counterfactual scenario is critical for the causal question but has nothing to do with identifying loss. The case is also not an example of worsening in the core sense seen above, insofar as Brown did not already suffer from pulmonary hypertension but would have done in any event.

Simplifying this sort of chronology into accessible terms, let us imagine that on the basis of the medical evidence we can say for example that a mild-level hypertension began

⁶⁵ [2013] EWHC 4067 (QBD).

⁶⁶ On the content of the submissions, see *ibid*, [14] f. On loss of expectation of life, cf. below, VI.2.

⁶⁷ See especially [2013] EWHC 4067 (QBD), [37] f.

on day 1. By day 10, this had become moderately severe and by day 20 severe. On day 30, let us say, death followed. Equally let us say that the evidence suggests that, absent the negligence, a mild form of the condition would have anyway emerged on day 5, moderate on day 15 and severe on day 25. Death would have followed on day 35. The detrimental event framework can highlight for a damages response a 5 day period of mild-level injury, a 5 day period of moderate-level injury, and a 5 day severe-level form of the loss without establishing a counterfactual corruption in the loss idea. This begins by saying there is a 10-day minor-level event, 10-day moderate event, and a 10-day severe event. This then passes to the causation enquiry where a counterfactual comparison is still entirely appropriate; nothing in identifying loss by event prevents use of the fundamental *conditio sine qua non* formula for causation. Causation can tell us that the last 5 days of each period of loss at the respective levels of severity were not caused by the negligence; in any event a natural cause would have produced that loss at those points. The negligence is superseded as cause. What passes on to assessment of a damages sum is thus only a five-day duration at each level.

Focusing on events, understood by reference to baseline categories of severity and duration, can thus account for the progression of disease whilst counterfactual comparison is confined purely to the clearer, secondary question of the causation of the loss so identified by the wrong. This also occurs without raising (or tempting us to account for) such unfortunate ideas as that death saves the victim from suffering 5 additional days of the illness, for example.⁶⁸ The five extra days which would have occurred in the counterfactual never appear in the discussion because there are no events occurring to the claimant after death, such that no question of the counterfactual course of his life at that point is ever raised.

⁶⁸ See e.g. Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-044 on death as deliverance, eradicating pain.

VI. Death

In cases where a victim dies, we must discuss three bases of statutory recovery relating to death, as well as the underlying common law position that there can be no recovery for or after death. Each of these will feature in this section, where it will be shown that the framework proposed for the identification of personal loss events is capable of offering an account compatible with each. The relevant statutory provisions are the Law Reform (Miscellaneous Provisions) Act 1934, s. 1 (1), whereby a deceased's claims accruing prior to death survive for the benefit of her estate; the Fatal Accidents Act 1976, s. 1 (as amended), for dependency, funeral costs etc. brought on behalf of the deceased's dependants;⁶⁹ and the Fatal Accidents Act 1976, s. 1A (as introduced by the Administration of Justice Act 1982, s. 3 (1)) for a defined damages sum for bereavement for the benefit of the spouse of the deceased.⁷⁰

There is of course no strict need to incorporate the statutory recoveries into a conceptual structure for the common law (particularly where the root liability is separate from negligence itself, as with the Fatal Accidents Act); it is only strictly necessary to understand how the common law position can be reached and then to understand the statutory recoveries as anomalous additions. Nevertheless, it is useful to illustrate that the statutory provisions can operate entirely comfortably alongside the conceptual scheme now proposed for personal losses in negligence and present no challenge to it.

1. Recovery for death

⁶⁹ As defined in s. 1 (3) of the Act.

⁷⁰ Or parent in the case of a deceased, unmarried minor – s. 1A (2) (b).

Death is naturally exceptional. The preceding chapters noted the inability of the traditional, state-based account of ‘non-pecuniary’ loss to discuss death except as a rank anomaly; there can be no comparison between a pre-existing or counterfactual state and non-existence.⁷¹ Policy arguments are brought to bear in discussing recovery instead, particularly in respect of (over-)compensation of heirs and dependants of the deceased, but without there being a clear reason why that is appropriate.⁷² No final answer has yet been provided to the question whether death is in fact identifiable as a recoverable loss on the personal loss framework. This can be dealt with now.

Unlike on the comparative state-based account, there would seem to be potential for death to be fitted into the new framework insofar as it occurs as an event. Just as with any other form of injury, death can be described in the binary terms of its occurrence or non-occurrence. As far as raising a detrimental implication is concerned, a suggestion that a claimant has no protected interest in life would seem to engage one of the most fundamental of personal interests the law is concerned with protecting and presents complete incompatibility between the implication raised and the interest. Critically, however, the occurrence of death not only *implies* the non-existence of the claimant’s interest, it actually *extinguishes* her interests from that point onwards. For this reason, we must take a little more time to consider how death ought to be analysed in terms of personal loss (particularly in light of the courts’ commitment currently to the rejection of death as a compensable loss in itself⁷³).

⁷¹ See chapters 2.II.1. Cf. chapter 3.II.1.

⁷² See chapter 2.II.1.

⁷³ On which see *Baker v Bolton* 170 ER 1033; (1808) 1 Camp 493 and *Admiralty Commissioners v Owners of Steamship Amerika* [1917] AC 38: between these sentiments and the rule that a personal action died with the person, it was obvious that one’s own death could not found one’s own claim for it. *Baker* was essentially left untouched by subsequent reform attempts: the Law Reform (Miscellaneous Provisions) Act 1934, removing the *actio personalis* rule generally, does not open any possibility for the deceased’s death itself to represent a personal loss (except insofar as loss of expectation of life was permitted for a time – see *Rose v Ford* [1937] AC 826 and cf. Paul Mitchell, *A History of Tort Law 1900-1950* (CUP 2015), 269 f). Cf. generally *ibid*, 252 ff.

Focusing on the extinction of personal interests which attends death, we might say that after death there is no discordance between the implication about the state of the claimant's interests raised by the death event and the actual state of those interests. Killing A in a car accident implies that A has no protected interest in life and, being dead, there is no extant interest in life on A's part. Where there is no such discordance, there can be no loss. This would explain the common law's basic position on recovery for death itself and, meanwhile, recovery for pre-death injuries is equally consistent with this event analysis; each of those events occurring before death raises *at the point of its occurrence* an implication discordant with the actuality of the claimant's interests, still existing at that moment because she is not (yet) dead.⁷⁴ Admittedly, though, there is a potential logic problem here – in the case of death as an event itself, the extinction of the interests would seem to happen at precisely the same time as the implied claim is made about the state of those interests; both happen in the instant of the event of death. Beforehand, the interests exist but an inconsistent claim has not yet been raised because death has not occurred; afterwards, the content of the claim reveals no disparity because the interests no longer exist. To quote Epicurus: '[death] does not then concern either the living or the dead, since for the former it is not, and the latter are no more.'⁷⁵

The vital question is therefore what the position at the precise moment of the event (death) is (bearing in mind that no comparative reference can be made to another point in time). Fortunately, questions relating to apparently simultaneous, inconsistent occurrences have an ancient pedigree in English law, and it seems clear that it is possible to treat one thing as happening after another whilst maintaining that they both nevertheless occur in the same instant (however improbable that might appear). The point was expressed early on by

⁷⁴ It is irrelevant for present purposes that the action is only preserved past the point of death by statute (see below, VI.3, on the Law Reform (Miscellaneous Provisions) Act 1934). Again, though, actionable damage is still required pre-death for these losses to fall within a claim – cf. the *Hicks* discussion above, IV.

⁷⁵ C. Bailey, *Epicurus. The Extant Remains* (OUP 1926), 85 (Letter to Menoeceus).

counsel for the plaintiff in *Hales v Petit*:⁷⁶ ‘...in things of an instant there is a priority of time in consideration of law, and the one shall be said to precede the other, although both shall be said to happen at one instant...’⁷⁷ Though the court did not rule on that point (holding instead that there was no true simultaneity to generate the problem⁷⁸), it was noted and adopted later by various judges and writers of authority, including, for example, Lord Blackburn,⁷⁹ Sir Edward Coke,⁸⁰ and Charles Viner.⁸¹ There are also areas of the current law where priority is used in the same way to resolve a difficulty of chronology. The relationship between survivorship and testamentary succession is one example. Where a will purports to dispose of an interest under a joint tenancy, survivorship is said to operate before the will despite both taking effect at precisely the point of death.⁸² The authors Gray and Gray cite Coke’s discussion noted immediately above as their authority on the proposition, supported by Blackstone’s maxim: *ius accrescendi praefertur ultimae voluntati*. Similarly, in cases of *commorientes* under the Law of Property Act 1925, s. 184, failings in chronology (albeit here arising from a lack of evidence of ordering rather than true simultaneity⁸³) are cured by a rule of priority: the deceased parties are treated as having died in age order. That form of mechanism also does not appear to have been controversial, with the section only arousing one raised eyebrow in Parliament on the more

⁷⁶ *Hales v Petit* 75 ER 387; (1561) 1 Plow 253. James Hales had drowned himself (a felonious suicide) – the temporal issue concerned the specific interrelation of the points in time at which he committed the felony (when his property should have become forfeit) and died (when his property should have devolved to his wife).

⁷⁷ *Ibid*, 395.

⁷⁸ The felony was committed when Hales threw himself into the water, survivorship operated at his actual death.

⁷⁹ Analogising to this ‘indivisible instant’ in *Williams v Mercier* (1884) 10 App Cas 1, 10.

⁸⁰ ‘...[Y]et in consideration of law there is a prioritie [sic] of time in an instant...’ Edward Coke, *A Commentary Upon Littleton* (18th edn, London 1823), 185 b. Cf. *Frampton v Gerrard* (1602) BL Add MS 25203, f 538, citing as authority White’s case – potentially *White v White* (1599/1600) M 41 and 42 Eliz (Common Pleas), equally cited in *Gardiner v Bredon* (1597) 1 Co Rep 76 on a similar instant/priority issue.

⁸¹ ‘An instant is not to be considered in law as in logick [sic] as a point of time and no parcel of time; but in our law things which are to be done in an instant have in consideration of law a priority of time in them...’, Charles Viner, *A General Abridgment of Law and Equity*, vol 14 (2nd edn, London 1793), Instant B 1 (p 448).

⁸² See e.g. Kevin Gray and Susan Gray, *Elements of Land Law* (5th edn, OUP 2009), para 7.4.16.

⁸³ Cf. the discussion in *Hickman v Peacey* [1945] AC 304.

practical basis that ‘...generally in those cases the survivors will be women, as the younger of the two, and so we may have land going in a direction which we did not anticipate.’⁸⁴

In the present context, then, the implied statement about the claimant’s interests and the extinction of those interests occur at the same time, but they can as between themselves have a priority ordering. If legal priority were given to the extinction of the interests, then that would be deemed to occur first, and then the implied claim about the interests would not be incompatible with the state of those interests (because they would indeed be non-existent at the point the claim is held to be made); death would thus *not* come as a loss. If priority were accorded to the implied claim, by contrast, then at the point of its making it would be incompatible with the claimant’s interests (albeit that the reality then changes); death *would* then come as a loss to the claimant.

There is no logical answer to the choice between those alternatives, only a normative one,⁸⁵ and the policy choice of the courts seems clear – death itself does not come as a loss. The arguments lying behind that policy choice are well-rehearsed and some have also already been noted briefly in chapter two. As noted there, amongst them we find the assertion that the inestimability of the value of life prevents an award.⁸⁶ Just as that argument cannot carry much weight on the diminution in value approach, so too will it fail to convince with personal losses; in any event there is no attempt to value death or the interest in life.⁸⁷ Likewise, the idea that ‘death acts as deliverance for the victim’⁸⁸ by eradicating e.g. pain etc. cannot be convincing where the loss does not relate to being ‘factually worse off’ in the traditional sense. An argument that death would prove cheaper

⁸⁴ Sir Thomas Bramsdon (Liberal, Portsmouth), Hansard HC Deb (15 May 1922), vol 154 col 136.

⁸⁵ Compare Bramsdon *ibid.* – unpalatable though any underlying reluctance to divert property to women would be to modern ears, the point would be in the right form: a raw policy idea. Of course, not all priority decisions need to be made on policy – the above-mentioned priority of survivorship over a will can be and is determined by a different chronology – the time of vesting of the root interest.

⁸⁶ See e.g. *Armsworth v South-Eastern Railway Co* (1847) 11 Jurist 758, 759 (Parke B).

⁸⁷ See chapters. 2.II.2 and 3.II.1 (and *passim* on loss avoiding value) and 5, especially 5.IV (on what damages for personal loss do represent).

⁸⁸ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 38-044.

than injury if it is not itself recognised as loss could, by contrast, still be made. Perhaps the most convincing point remaining, though, is the practical concern that the award will necessarily be inherited immediately and form a windfall for heirs who may very likely recover independently under the Fatal Accidents Act.⁸⁹ Whilst that would apply equally to any sum acquired under the Law Reform (Miscellaneous Provisions) Act 1934,⁹⁰ the statute can be seen as an exception; the legislature could have moulded the exception to include recovery for death ipse but seemingly declined. Whether or not, though, these reasons are convincing or whether recoverability should be preferred is not of particular importance now – the crucial fact is that the institution of a legal priority to resolve a chronological shortcoming in the event approach provides a clear explanation for a policy-based argumentation. This accords with how the law has previously responded to chronological difficulties and allows us to avoid designating death an outright exceptional case as other analyses must. The event analysis can, in short, coherently respond to the case of death.

That, then, covers the question of a victim having a claim for her own death (which would survive for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934, were it arguable⁹¹). As far as the elements of current (statutory) recovery for death-related detriments are concerned, it is important only to note that the claims under the Fatal Accidents Act 1976 shift emphasis to injury to and bereavement of parties other than the deceased⁹² (albeit that recovery is made derivative on the existence-but-for-the-death of a claim by the deceased⁹³). It is submitted that they should thus be seen in terms of a very limited framework for the exceptional recovery of relational harm (in the form of pure economic loss and grief for the primary victim) and so in no way a

⁸⁹ On which see immediately below.

⁹⁰ On which see below, VI.3.

⁹¹ On which see below, chapter 4.VI.3.

⁹² See ss. 1, 1A Fatal Accidents Act 1976.

⁹³ See s. 1 (1) Fatal Accidents Act 1976.

recovery for ‘death’ proper which would impact on the discussion above; death is the context, not the loss itself. These are clearly the personal claims of the parties bringing them and not in any sense survivals from the deceased.⁹⁴ From the dependants’ perspective, the recovery of a bereavement sum, for example, is for the event of the onset of grief for their loved one rather than for their death itself (albeit that death is the trigger which causes the grief), while the rest of the recoverable losses are pecuniary. Meanwhile, the condition that a claim by the deceased would have existed (but for her death) serves to restrict the availability of this unusual (and potentially very expansive) relational recovery; it does not make death the subject of the claim. Nothing in that analysis therefore represents a problem for the personal loss framework as outlined.

2. Shortened life expectancy

A further issue which might appear very close to death (as it were) is shortened life expectancy. This could be viewed in several alternative ways under the personal loss framework. It should, first and foremost, be clear that the expectation of life itself cannot now form the subject of a loss, concordantly with s. 1 (1) (a) Administration of Justice Act 1982 and in contrast with the 48-year period preceding it.⁹⁵ The question is thus whether and how such a loss could have been conceived to reach the common law position.

Viewing the change in life expectancy as altering the prognosis on a ‘life’ as a continuing phenomenon is easy to dismiss as a candidate for a personal loss. This might be a natural way to think about shortened life expectancy, but ‘life’ cannot be an event in the relevant sense, not least because there is no detriment involved through an implication

⁹⁴ Very explicitly so W.V. Horton Rogers, ‘Compensation for Personal Injury in England’ in BA Koch and H Koziol (eds), *Compensation for Personal Injury in Comparative Perspective* (Springer 2003), no 61.

⁹⁵ See generally Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 38-258 f. The award was introduced by *Flint v Lovell* [1935] 1 KB 354. Cf. e.g. *Shaw v Kovac* [2015] EWHC 3335, [21] ff, [36]; [2017] EWCA Civ 1028, [84] for a recent case reaffirming the position where a claim was understood to be trying to avoid the statute.

raised by the would-be event ('life') itself. Almost everything about such an analysis would be wrong. A more promising suggestion would be to focus on shortening life expectancy as causing (earlier) death. The event would be death at time t_1 , rather than the later, previously projected t_2 and it would be seen to present an interference with an interest in life. This would also not be an acceptable solution for various reasons, though, not least of which is that it is unclear on an event framework why the time of the occurrence of an event matters (though contrast duration⁹⁶). The particular point of incidence seems only to have relevance by reference to other issues such as the (frustrated) occurrence of other events – what matters in reality is what the claimant would have done with the extra time, the opportunities which now will not arise etc. – but the event account cannot operate on such a comparative basis (again, a marked difference from a straightforward attempt to evaluate effects). As far as death itself is concerned, the question is only whether or not it happened and, as discussed above, focusing on the occurrence of death triggers a policy choice clearly made in practice against a claim.

This suggests that abolition of the recovery for loss of expectation of life was in fact correct, and that the courts made an error in allowing such recovery for the brief period they did. The much better option is indeed to decline to see the change in life expectancy as an event at all and instead to consider the important question of how it may alter the prognosis on other events. For example, if C has what would otherwise seem to be a long-term continuing leg injury but dies in the short term of her injuries, this effectively converts the leg injury to a short-term continuing event when it is identified at the later trial, in precisely the way a supervening injury would do.⁹⁷ The claimant, meanwhile, might be aware of the shortened expectation, inducing distress or suffering – a possibility

⁹⁶ Above, III.

⁹⁷ See above, III.

acknowledged and provided for in the Administration of Justice Act 1982.⁹⁸ This can be analysed as a separate, straightforward kind of event (relating to emotional integrity),⁹⁹ though again it is necessary to note that the analysis of such feelings provided by the loss framework does not answer the damage question (and so if the feelings are not themselves, nor follow on from, an actionable damage, there will still be no recovery¹⁰⁰). Equally, autonomy interests might be considered, with some event being argued to imply a lack of protected interest in making, for example, healthcare choices (easily misarticulated in loss of life or loss of life expectancy terms where death results).¹⁰¹ Again, an autonomy interest-related loss event occurring prior to death represents no new challenge here. This analysis is again a coherent and consistent outworking of the event-loss analysis.

3. Survival of claims past death

As a third and final section, it is necessary to note briefly the final statutory provision related to death that is relevant for present purposes and not yet discussed – the survival of claims accruing to the deceased prior to death for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934, s. 1 (1). It should already be clear, but bears explicit recognition, that no analysis of death is compromised by the existence of this provision; it operates expressly on claims which have already accrued prior to death. Under the dominant value-loss approach, the removal of the old rule that an *actio personalis cum persona moritur* served simply as a policy corrective where accidents increasingly tended

⁹⁸ S. 1 (1) (b).

⁹⁹ On such events generally, see especially chapter 3.II.3.a.

¹⁰⁰ Cf. e.g. *Hicks v Chief Constable of South Yorkshire* [1992] PIQR P433. The case also makes clear obiter that the fear of an impending death is not enough to constitute loss – *ibid*, 436.

¹⁰¹ See e.g. *Shaw v Kovac* [2015] EWHC 3335 (QBD), [21] ff. The claim was expressed poorly and rejected – *ibid* and [34] ff. The Court of Appeal affirmed the decision – [2017] EWCA Civ 1028 – but again focused on the apparent attempt to skirt the loss of life expectancy rule (e.g. [84] per Davis LJ) and gave unsatisfying normative reasoning on autonomy (with e.g. only crude comparison to loss of reproductive autonomy) (see especially [54 ff]).

to kill (such that claims arising would immediately be extinguished) without the tortfeasors facing any repercussions¹⁰² and did not alter the loss question. As has already proved critical in the discussions above, the implied claim raised by the occurrence of an event need only be inconsistent with the interests concerned at the point at which it is in fact raised to qualify as detrimental; nothing in the later (even if only slightly later) death of the victim will alter that. Nevertheless, the fact of death will affect e.g. the duration of any loss event as discussed in section II above, and so would to that extent prove relevant to the identification of the loss and assessment of a damages sum. The question, though, of whether a claim for loss, once claim and loss have thus accrued, can be brought on behalf of a deceased's estate represents no further challenge to the personal loss proposal here.

VII. Conclusion

In this chapter, an attempt has been made to reconcile the personal loss concept outlined in chapter three with the practical and intuitive imperative to relate damages awards to the duration and severity of the injury incurred, as well as to confront the issue of the most serious injury of all, death. Despite the apparent tension between a binary event structure and nebulous qualities such as duration/severity, it has been shown that it is possible to identify losses without compromising the integrity of the system of binary events. Non-binary detriment ideas will, though, emerge at assessment to give the discrete event implications a more granular texture.

By understanding the incompatibility between the implied claim about the claimant's interests and the extent of her interests as protected by the law as by definition at least roughly co-extensive with the extent of the injury whose incidence makes the implied claim, it is clear to see how losses can be identified by reference to injuries of particular

¹⁰² See Paul Mitchell, *A History of Tort Law 1900-1950* (CUP 2015), 252.

degrees of severity. Similarly, prognosis categories (informed or reformed by reference to actual past facts where available) allow for recognition of the continuation of an event. In each case, pragmatic qualitative descriptors are introduced, rather than any quantitative scale, with each being discrete and separate from the others. These descriptors allow a normatively and practically valuable label to be attached to the loss event in advance of assessment, producing categories which will to an extent limit the assessment discretion of a judge.¹⁰³

Where injuries present as the exacerbation or worsening of a pre-existing detriment or injury, this can, contrary to what might be presumed with a non-comparative analysis, similarly be accommodated within the framework proposed. The answer lies in understanding injuries as superseding less serious forms of the same. Once the severity and duration solutions are then combined, the framework can respond to the pre-existence of an injury in less severe form without resort to any comparison. This will, though, involve the recognition of transitional-duration forms of the loss events.

Death, meanwhile, though particularly serious as a phenomenon, does not present as a personal loss on our framework, a result consistent with (because driven by) the court's policy decisions on the issue. By virtue of the change in the reality of the claimant's interests which death represents, the element of detriment in the form of incompatibility is absent. As with other apparently anomalous categories of loss regularised by the proposed framework, death can be brought into the conceptual fold insofar as the event analysis applies with only one minor supplement in the priority choice, in contrast with orthodoxy's inability to even begin a comparative identification.

With these issues explained, the discussion of personal loss identification can be drawn to a close. The argument through this and the preceding three chapters has sought to show that our traditional framework for understanding non-pecuniary loss is conceptually

¹⁰³ A matter dealt with in chapter 6.

deficient. Insofar as they relate to loss itself, these deficiencies can be dealt with by developing a new, event-based analysis of personal loss focused on the occurrence of events which are detrimental to the claimant insofar as they raise implications about her interests which are incompatible with the reality. The result is a qualitative, non-comparative account of a personal loss designed to be acceptable both in practice and in theory. The remaining difficulties relate to the progression from loss to damages assessment and this is where the analysis now turns. The following chapter begins this next stage by considering the functional basis for an assessment.

Chapter 5 – Assessment Operators

I. Introduction

Having established a personal loss framework on the basis of detrimental events in the preceding chapters, it is time to turn to the question of assessment: on what model can the courts arrive at a monetary sum to award as damages for the personal losses identified as already described? The personal loss concept offers a notion of detriment in the inconsistency between an implication raised by an event and the extent of the claimant's protected interests, on which assessment will be able to focus. The critical question now, though, is to ask what operator or function drives that assessment of the detriment, the final product of which is the damages sum, what form of processing does the machine do? Generally, the answer is presumed to be value replacement as compensation, concordant with compensation's unwarranted prominence within the remedy as a whole on dominant theory (even used as a guiding criterion for defining loss itself).¹ Now that we are to understand personal loss as detrimental events, though, that compensation commitment is untenable. Compensation as value replacement cannot operate to produce a damages sum when the (value-less) input is an event raising implications inconsistent with a personal interest. This will be discussed in detail below (VI.1). It will also be seen that a number of further assessment operators are equally inappropriate (VI.2-4).

Meanwhile, though, in competition with the more usual functional aims described within the law of torts, a new focus on a concept of 'vindication' has been emerging in numerous areas.² In part this is triggered by its appearance in various modern judicial decisions where the idea of compensation is downplayed. The torts involved are usually

¹ Compensation was identified in chapter 1.II.1 as a basic commitment of the orthodox analysis, and in chapter 2 we discussed its unwarranted dominance across the personal loss field.

² Chapter 1.I briefly touched upon this.

intentional torts, such as false imprisonment³ and battery,⁴ but have included negligence.⁵ ‘Vindication’ is also starting to appear more prominently in the tort literature, including at the level of student text- and casebooks.⁶ Certainly its status as a member of the pantheon of tort purposes is beyond doubt – it is said to be entirely orthodox that a vindication of interests is achieved in a general sense by tort recoveries.⁷ However, whether it may operate in particular contexts as a more specific, central function (and its precise meaning in that regard) are controversial.

The core of this chapter will consider whether this ‘vindication’ can assume the mantle of the assessment operator for personal losses. Given the lack of agreement and clarity over precisely what is meant by the term, for present purposes and to maintain a clear focus, one recent discussion will serve primarily as the focal point – that presented by Jason Varuhas (II).⁸ This will be considered in light of the preceding loss analysis and a *prima facie* argument made for its good fit as an operator (III). Vindication will be seen to guide the generation of an award as a counterstatement to the negative implication raised by a loss event on the personal loss approach (IV). This fit will be crystallised on the basis of a recap and reanalysis of the precise factors considered relevant to the assessment of damages sums (V). Thereafter, attention will return to other candidate operators to demonstrate their relative inadequacy in guiding damages awards for personal losses (VI). The concepts of compensation, solatium, punishment and satisfaction all show insufficient engagement with the nature of personal loss and the assessment factors which appear to be relevant.

³ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245.

⁴ *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962.

⁵ *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134, [24] (Lord Steyn), [87] (Lord Hope).

⁶ See the examples listed in Jason Varuhas, ‘The Concept of Vindication in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 254 n 2.

⁷ See e.g. Kit Barker, ‘Private and Public: The Mixed Concept of Vindication in Torts and Private Law’ in Pitel, SGA, Neyers, JW and Chamberlain, E (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013), 59.

⁸ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253. For simplicity, references throughout this chapter are to that article, though Varuhas has republished the substance as chapter 2 of his monograph: *Damages and Human Rights* (Hart 2016).

II. Vindication in Varuhas

Vindication for Varuhas comes in two senses. One is a ‘basic’ sense common to all torts, whereby the law affirms rights through the provision of actions and remedies for breach of those rights (an orthodox sense).⁹ He posits that there is then also a ‘specialised’ sense of vindication (the one of prime interest to him and here) of attesting to, affirming and reinforcing the inherent value of especially important personal interests (inter se) in given contexts.¹⁰ In Varuhas’ understanding to that end, ‘interest’ means a basic aspect of human well-being, which might be described as an asset; these goods are ordered by the law into a hierarchy.¹¹ Vindication in the specialised sense is said to be one function amongst others and the relative priorities each function receives are variable in different contexts.¹² Varuhas’ account also focuses predominantly on the so-called ‘macro-level’, overarching function of each tort, rather than the ‘micro-level’ functions of particular aspects of liability and recovery.

This leads Varuhas to focus to a great extent on the torts actionable per se. His framework outlines a concept of so-called ‘normative damage’ (damage where the claimant is not factually worse off, there is only interference with an underlying interest simpliciter), recovery for which is said to be a key feature demonstrating macro-level vindicatory function in a tort.¹³ The absence of such recovery from the tort of negligence demonstrates that negligence does not display this sense of vindication at the same ‘macro

⁹ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 258; cf. Barker’s identifying an ‘orthodox’ idea – Kit Barker, ‘Private and Public: The Mixed Concept of Vindication in Torts and Private Law’ in Pitel, SGA, Neyers, JW and Chamberlain, E (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013), 59.

¹⁰ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 258, 258 f.

¹¹ Ibid, 257 f (with further references on that idea).

¹² Ibid, 254, 259 f.

¹³ Ibid, 268 f. Cf. Stevens’ ‘legal or normative’ damage in the interference with a right for which he would award so-called ‘substitutive damages’ – aiming to replace, rather than vindicate, with money; Robert Stevens, *Torts and Rights* (OUP 2007), 59 ff.

level’ (albeit that, on a ‘micro level’, one of the multiple purposes served by particular facets of the liability can be vindication).¹⁴ At the same time, such recovery in the torts actionable per se demonstrates for Varuhas that they do have a central, macro-level function of vindication in the specialised sense – it is a defining function of the respective torts to affirm and reinforce the value of the particularly important personal interests affected by battery, false imprisonment etc., and this is demonstrated according to Varuhas in the mere interference with the interest leading to substantial recovery.¹⁵ The availability of nominal damages in those torts, and their unavailability in negligence, is seen as a corollary of this.¹⁶ In respect of the focus on some recoveries being for interferences with interests themselves, Varuhas’ understanding in part matches several other theorists such as Stevens.¹⁷

Varuhas demonstrates this vindication of/recovery for an interest interference simpliciter through an extended critique of the decision in *Lumba*; in that case, the claimants had been detained unlawfully because of procedural errors made in reaching the detention decision. In the absence of those errors, the claimants would anyway have been detained.¹⁸ The court according to Varuhas should have made a substantial award in the resulting false imprisonment action just for the deprivation of liberty itself, and not focused on whether any ‘factual loss’ could be identified as a matter of counterfactual comparison: the deprivation in the tort of false imprisonment is interpreted as a normative damage and according to this theory should lead to a monetary award without more.¹⁹ This is, for Varuhas, where the distinction from loss- and compensation-dominated recoveries bites; if so-to-say ‘actual’ damage is required, Varuhas sees the tort as loss and compensation

¹⁴ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 268 ff.

¹⁵ Ibid, 261 ff.

¹⁶ Ibid, 290.

¹⁷ Robert Stevens, *Torts and Rights* (OUP 2007), 59 ff.

¹⁸ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245.

¹⁹ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 279 ff.

focused and recovery is for factual detriment, whilst where normative damage suffices the tort vindicates interests. False imprisonment is understood by him as an example of the latter, such that a focus on factual detriment is an error. According to that author, however, there is still no need for any novel ‘vindicatory damages’ award in these vindicatory torts – the ‘compensatory damages’ award is supposed to be sufficient.²⁰

Varuhas explicitly prefers his normative damage vindication concept to the alternative of Stevens’ substitutive damages, which for Varuhas does not come close to capturing the sense of the recovery in two key ways. Firstly, Varuhas focuses on interests rather than on some notion of rights. This he justifies on the basis that the content of the interest rather the form in which it is presented (a right) is relevant for the hierarchy of those interests and in terms of ascribing value to particular interferences.²¹ This thesis has equally preferred interests on the similar basis that this engages the defining characteristics of non-financial detriments and the normative relationship between them in a way in which the abstract, formal ‘right’ cannot.²² It must be said immediately, though, that one of those defining characteristics is the incompatibility with value,²³ such that in respect of personal loss, both Varuhas and Stevens are wrong to support ‘valuation’. Secondly, Varuhas claims that Stevens’ framework is not well supported by the jurisprudence and cannot properly explain how the different forms of award divide – citing inter alia the gulf between loss of amenity (as a right interference attracting substitutive damages) and pain and suffering (as a consequential loss attracting compensatory damages), rooted only in the idea that one is experiential.²⁴ Varuhas is correct to point out that the two are nevertheless losses of the

²⁰ Ibid, 291. Cf. Kit Barker, ‘Private and Public: The Mixed Concept of Vindication in Torts and Private Law’ in Pitel, SGA, Neyers, JW and Chamberlain, E (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013), 91.

²¹ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 271 ff.

²² Cf. chapter 3.II.2.

²³ Cf. especially chapter 2.II.2.

²⁴ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 273 ff.

same kind,²⁵ and this has been discussed in chapter three – the rights substitution theory draws a false dividing line between awards.

It should also be clear that Stevens' theory of substitutive damages entails a very weak idea in 'substitution' itself – it can mean only that the claimant has the damages where (and because) before she had the right, because there is and can be no 'replacement' in the absence of proper equivalence between the two.²⁶ To this extent there is only very minimal engagement between the remedy and the bad it seeks to respond to – the only connection is the reason why the payment is ordered or made (D pays C because C lost her right). This can be contrasted with compensation, for example, where the connection (assuming we are in a context where compensation can function²⁷) is both the reason and correction (D pays C because C lost value; D paying C eradicates the value loss). Substitutive damages thus rely on a very weak transition from loss fact as identified through to damages sum.

As it appears to Varuhas, meanwhile, the tort of *negligence* does not evince the same macro-level vindication function given the existence of a requirement to prove actionable damage (understood as a 'factual' negative effect of wrongdoing identified by comparison with the claimant's counterfactual position) and the absence of any recovery for mere 'normative damage'.²⁸ Where in other torts there would be normative damage, the role it plays in negligence is apparently superseded by a 'factual loss' concept of damage. (Practically, the major difference from Stevens is thus the placement of this boundary – Varuhas sees no general non-factual loss recovery in negligence, Stevens does, alongside

²⁵ Ibid, 273. Varuhas there identifies both as 'factual losses'. The discussions below, III, and in chapter 3.III.1 identify that he himself makes inappropriate divisions elsewhere.

²⁶ It is only a minor conceptual improvement on McGregor asserting that one receives damages in substitution for more important things – Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 2-001; there it meant that C has money in place of e.g her leg, here she apparently has money in place of a valuable right.

²⁷ Clearly with pecuniary loss, for example. On its non-fit for personal loss, see below, VI.1.

²⁸ Jason Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253, 268 ff.

compensation for consequential loss²⁹). At the overarching, ‘macro’ level, negligence is therefore seen by Varuhas as reactive to negative effects rather than wrongs to interests themselves, and thus as fundamentally compensatory.

The analysis straightforwardly does not make a perfect fit with practice given emerging modern forms of recovery in negligence which do in fact look like the sort of ‘normative damage’ case Varuhas maintains cannot exist in negligence (cases like *Rees*). These Varuhas therefore dismisses as naked, policy-driven exceptions.³⁰ Where a conventional award is made to parents in a wrongful birth action, this is said not to demonstrate that *negligence* provides recovery for interests themselves (in the absence of ‘factual’ detriment), because it is simply a pragmatic aberration (which would be better systematised elsewhere).³¹ Policy is said to be driving an exception and Varuhas invites his reader to decline to integrate that form of recovery any further into the conceptual structure. Observers should seemingly just accept an exception proving the rule; whilst that seems more plausible than Stevens’ dividing line straight through non-pecuniary losses (as discussed above), it is clearly still not a comfortable conceptual stand.

Finally, it must be emphasised that Varuhas expressly provides that there may be senses in which a micro-level vindication underpinning appears in respect of some aspect of even torts which at the macro-level are not primarily vindicatory. Indeed, he refers to the ease of establishing liability for physical damage in negligence as compared to economic damage as such a ‘trace’.³²

²⁹ To clarify, the present theory agrees with Stevens that there is some general recovery not based on a concept of factual loss (as per the personal loss concept expounded in chapter 3) but agrees with Varuhas that interests should be the focus and Stevens’ dividing line is misconceived (see above and chapter 3.III.1): instead personal losses all form a consistent category based on events detrimental in raising negative implications about personal interests.

³⁰ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 269 f.

³¹ Ibid, 270

³² Ibid, 260.

III. Negligence reconsidered

It is clear, then, that at this ‘micro’ level there is still recognition of a role for vindication in Varuhas’ sense, and the potential for vindictory purpose in theory to come to predominate within a certain region of the analytical structure of negligence. Just as Varuhas recognises variations in damage, duty (etc.) rules reflect interest hierarchies (and thus have varying degrees of relation to vindication), so we might also add that personal loss rules can demonstrate the tort’s responsiveness to the underlying importance of the interests concerned. Varuhas’ approach to nominal damages demonstrates, of course, that aspects of the *remedial* stages can evince vindictory function just like *liability* structures. The contention which will be argued for here is thus that personal losses do likewise engage a vindictory function once they are understood in the form proposed in this thesis. As a first step in demonstrating this, it will be shown that conceptually the personal loss concept outlined in the preceding chapters can engage vindication within those parameters. Thereafter, in the sections which follow, we will consider in more detail some particular aspects of how an award can be said to vindicate for a personal loss as well as the more practical question of whether vindication is consistent with the factors considered relevant to the assessment of damages sums.

We begin, then, with the loss concept. Vindictory ideas can certainly come to predominate in the personal loss arena where the bad is (indeed can only be) seen in terms of interest ideas rather than (the correction of) factual worse off-ness (with its close association to the alternative aim of compensation). Within that idea, the focus would not be on ‘maintenance’ of the interests or defence against ‘encroachment’.³³ Such infringement-based thinking (as with Stevens) is inapt to describe personal loss recovery:

³³ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 258 and n 23.

unlike these authors, who do not challenge the role of value and quantity,³⁴ in chapter three we rejected both quantity and thus spatial ideas such as infringement which import quantitative description and are incompatible with the continued existence of the interest independent of the facts which might attest to it.³⁵ Varuhas does though discuss his vindication concept as equally meaning affirm, attest to and ‘clear from...doubt, by means of demonstration’.³⁶ Doubt cast over the interest expresses perfectly the idea of detriment (as negative implication) established for event-based personal loss in chapter three. Insofar as the personal loss concept shows that loss in negligence there relates to something other than effects/so-called ‘factual loss’, it falls within the purview of vindication.

Having established that Varuhas is incorrect on the loss concept in negligence (insofar as personal loss is not to be understood as ‘factual worse off-ness’) and thus that vindication can engage, we might also recap here the discussion of the boundary line between loss and damage in chapter three.³⁷ It was argued there that the normative damage idea itself (and the same applies to Stevens’ ‘substitutive damages for a right’) falsely collapses liability and remedy issues; the theories deploy the one interest infringement idea in two functionally distinct ways. In so doing, such theories cause problems by placing unjustified divisions between forms of loss – Varuhas’ justified criticism of Stevens doing so featured immediately above, and the discussion in chapter three made clear that Varuhas does the same through his framing of so-called ‘damage’ and ‘consequential loss’.³⁸ In short, Varuhas’ failure to recognise the independence of loss from actionable damage leaves him willing to countenance multiple definitional ideas for loss where this can lead to double-accounting and inconsistency. The most obvious outworking of the error remains his insistence that awards for loss of reproductive autonomy are pure exceptions and need

³⁴ See Robert Stevens, *Torts and Rights* (OUP 2007), 78 f for Stevens’ endorsement of valuation.

³⁵ See chapter 3.II.2.

³⁶ Jason Varuhas, ‘The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages’ (2014) 34 OJLS 253, 258 and n 23.

³⁷ See chapter 3.III.1.

³⁸ See chapter 3.III.1.

not be integrated into a broader understanding of damages in negligence: these clearly cannot be reconciled with orthodox compensation theory,³⁹ but Varuhas cannot recognise them within a standard loss idea in negligence without undermining his normative damage-based arguments. The normative damage idea results from misunderstanding loss, however, and a true understanding leads to an interest-based, unitary concept for personal losses as outlined in this thesis. Varuhas' refusal to acknowledge a more general vindicatory current in negligence (including *Rees* recovery) is thus an error.

The present thesis does accept Varuhas' broader points that the law displays hierarchies of interests, that some interests are protected in ways which do not relate to 'factual' effects, that this can occur at the macro (guiding the tort as a whole) or micro (guiding a particular element) level, and that a new form of vindicatory recovery is not required insofar as the purpose is in fact already achieved by so-called 'compensatory' awards.⁴⁰ Those are supported by the personal loss ideas developed here. It is vital to the present argument, however, that the idea of normative damage is a fallacy insofar as it is used to establish loss. Aside where losses are fundamentally different in character (the distinction between pecuniary and personal losses), there must be no shifting of the means by which loss is identified for fear of accounting the same detriment multiple times. Damage, meanwhile, is an independent issue. Whilst the definition of damage in negligence may still mean the liability appears fundamentally compensatory (macro level), pace Varuhas this cannot carry over into loss and there are in fact loss ideas in negligence which do relate directly to interests, engaging a vindication operator. The division between pecuniary and personal loss reinforced and exploited in this thesis, and the different treatment each receives, itself reflects an important intuitive truth about the hierarchy of

³⁹ Cf. chapter 1.III.3.

⁴⁰ Jason Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253, 258 f, 291. On the last point, this thesis, of course, is focused on reconceptualising existing 'compensatory' recovery for 'non-pecuniary loss'.

interests – our financial ones are less important. Exactly the opposite implication is in fact raised by current orthodoxy, as discussed in the earlier chapters of this thesis.⁴¹

Of course, the interest-focused idea expounded in the thesis is only relevant within the limited confines of the personal loss recovery concept being developed and thus only at the remedy stage and for non-financial detriments. Nothing is altered as far as the (‘macro-level’) basis of the liability’s imposition is concerned.⁴² It should be remembered, therefore, that the position taken here is not a counterargument to Varuhas’ stance that the tort of negligence is not concerned primarily with vindicating interests (no position is taken here on the purpose of negligence broadly).⁴³ Yet on a micro-level the operation of personal loss recovery does recall a vindicatory aim.

IV. Counterstatement of a negative implication

Vindication so understood thus shows an initial fit as an assessment operator for personal losses, and it will be seen below that it represents a better fit than other candidates for that role. On this understanding the damages sum will be so assessed as to present a statement which acknowledges (to the notional, objective observer) the interest over which doubt was cast by an incompatible implication raised; it is a counterstatement to the implied negative statement raised by the event and is assessed to demonstrate seriousness comparable to the seriousness of the inconsistency between interest and implication (the detriment). In this sense, it represents a public statement of the extent of the claimant’s interest. This structure demonstrates clearly how the vindicatory remedy is normatively relevant – personal loss provides the harm in a form which, unlike pain or happiness etc.,

⁴¹ See in particular chapter 2.II.4.

⁴² Others have suggested that a compensatory purpose apparently dominating the liability seems naturally to suggest an equivalent dominance in the damages remedy, but it is not clear that compensation underlies the liability, nor that the balance of purposes in liability and remedies must be identical. Cf. e.g. Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 712 f.

⁴³ Except insofar as he must be wrong to base that conclusion on ‘normative damage’, which concept is false.

remains constant until a corrective is set in place and vindication provides a corrective in the same form as that loss (an implied statement).⁴⁴

This looks like ‘public messaging’ in the form others have discussed before, but it must not be confused for a broader social idea of deterrence, social education or anything similar.⁴⁵ The idea is intended here as a purely private one – the claimant would have her interest free of association with the inconsistent suggestion the defendant caused to be raised, and the defendant must disarm that inconsistency. Nevertheless, the idea of ‘messaging’ through damages awards has been subject to criticism and some of it must be challenged here as relevant to the private idea under consideration insofar as it entails that the damages award does carry a message. Barker raises two problems of relevance here: that judicial decisions reach a narrow audience, and that it is questionable how precise a message money judgments can carry in contrast with the simple provision of reasons in a judgment.⁴⁶ The points are critical in the present context – a monetary award cannot be said to achieve the purpose proposed if it cannot reach an appropriate audience to dispel the negative implication nor raise a suitable, affirmatory statement (to offset the false implication raised publicly by the detrimental event experienced by the claimant).

First and foremost, the audience issue can be dismissed. There is a general, practical point to be raised insofar as dissemination of a message is not a single act but a process; ‘messaging’ occurs not only insofar as a statement is made when an assessor hands down a judgment, or when the defendant actually pays the sum, but also whenever that judgment or award is discussed. In particular, for example, if questioned on the source of a disablement or on the modalities of living with it, a victim could wax lyrical on the recourse she has had against the tortfeasor. Moreover, (aside any voluntary confidentiality or non-disclosure agreement) any claimant is free to disseminate the facts of her claim in

⁴⁴ Cf. e.g. the criticism of orthodoxy levied in chapter 2.II.2.

⁴⁵ Kit Barker, ‘Private and Public: The Mixed Concept of Vindication in Torts and Private Law’ in Pitel, SGA, Neyers, JW and Chamberlain, E (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013), 84 f.

⁴⁶ Ibid.

this way and as widely as she wishes with impunity. A defendant found liable in negligence could not, for example, maintain defamation against a claimant if she truthfully recounts to friends, acquaintances, or any passing stranger the terms of her award.⁴⁷ With the details of criminal punishments, as a comparison, even a slight exaggeration may not prevent the relevant defence operating⁴⁸ and there is no reason the same would not be true of civil awards.

Not only this, but the ‘audience’ for the message only needs to be the audience from whose perspective the original, negative implication was identified in order to satisfy the conceptual demand for conveying a counter-message. The relevant audience for identifying the loss is the notional observer discussed in preceding chapters;⁴⁹ the relevant audience for understanding the reassertion of the interest is thus likewise a notional observer. That is a low bar, easily met, in judging sufficient diffusion of a message. An important example case here would be one where a claimant remains anonymous.⁵⁰ There is no difficulty for the vindication of personal loss idea arising from the fact that no concrete individual can be identified who would receive and understand the counterstatement affirming the interests of the concrete claimant. A notional observer in knowledge of the facts can be considered to have received and understood it in the same way that such an observer received and understood the original implication. This is sufficient. Dissemination amongst an actual audience can still then lie entirely in the hands of the claimant protecting her anonymity.⁵¹

⁴⁷ Truth under the Defamation Act 2013, s. 2 is a full defence (subject to the very limited exception under the Rehabilitation of Offenders Act 1974, s. 8 [malicious publications regarding spent criminal convictions]), just as common law justification was (see e.g. *Edwards v Bell* 130 ER 162; (1824) 1 Bing 403).

⁴⁸ See e.g. *Alexander v North Eastern Railway Co* 122 ER 1221; (1865) 6 B & S 340.

⁴⁹ See especially chapter 3.II.2.

⁵⁰ A common occurrence in, for example, sexual abuse litigation, e.g. *KCR v The Scout Association* [2016] EWHC 587 (QBD) (the claim there concerned vicarious liability for assault, but negligence claims for third party liability can of course arise in similar circumstances).

⁵¹ Cf. the point made in chapter 3.II.2 in respect of Varuhas’ approach to loss of reputation in libel cases: receipt of a statement (and the associated spread of the relevant message) can be judged without reference to any particular person, but rather to a notional one.

Secondly, the imprecision issue is likewise not as powerful as it appears at first. The most important facet to bear in mind in that respect is that the message conveyed by a sum is not detached from the judgment or context in which it is awarded; reasons and damages are not mutually exclusive. The personal loss approach outlined in this thesis does promote better reasoning and articulation in respect of personal losses and thus of their importance, given that it brings to the surface important normative discussions about the recognition of a loss and demands a clear outline of concrete loss events for which there is then monetary recovery. This is further reinforced by articulation of the extent of the detriment within the assessment process⁵² which is then reflected in the damages sum as a kind of headline statement or summary. The money sum and the judgment reasons are supportive as far as they make a statement; the judgment expresses the detail of the losses and detriment, the damages sum both encapsulates that and gives it real, practical meaning by producing action and consequence. The monetary award renders the remedy demonstrative, not merely declaratory, and in a more powerful way than (for instance) an apology would. In demanding demonstration by the defendant, the remedy also ensures that recognition of the protected extent of the claimant's interest is acknowledged by the defendant and not merely by the legal system (through judgment reasons). The simple fact of the size of an award is thus one aspect of the strength of the implication to be raised, helping to convey the sense of the seriousness of the statement involved. It is not the exclusive source of information contained in the message and the judgment reasons alone would not carry the same weight.

The very fact of a counterstatement being made in the form of a court award, or else through some settlement process should, though, likewise be seen to carry important

⁵² See chapter 6.

implications.⁵³ Acceptance of the liability and payment in a settlement – the admission without having to fight through a trial – might be thought to represent stronger acknowledgement on the defendant’s part (going some way to justify why the monetary sums involved are smaller in settlements). The issue is not so close, the notional observer might think, that it could reasonably be fought over in a court – the interest and the conflict with it are clear.⁵⁴ At the same time, it does not undermine the argument as to demonstration by the defendant if an insurance company ultimately pays an award. The liability is imposed against the defendant’s name and the system relies on the defendant having made sufficient arrangements that the sum be paid (by taking out a policy). The defendant can thus be thought to have in part demonstrated an awareness of others’ interests in advance.

As regards the counterstatement idea, a final note might be made on the idea of seriousness. As suggested, the assessment would turn on finding a sum of money the payment of which would make a counterstatement serious enough to match the seriousness of the inconsistency between the implication raised about the claimant’s interest and that interest. It thus engages the detriment part of the detrimental event. As discussed before and in more detail later, the seriousness of the inconsistency depends on the extent of the negative implication. Unlike the loss event itself, that implication it raises is a non-binary idea informed by the full effects of the loss event suffered by the claimant. Insofar as the counterstatement must match (in seriousness) the inconsistency as dictated by the non-binary detriment, the counterstatement to be made is tied into that detriment. There is thus a very firm progression from loss event, to the associated detriment, to the criterion for the assessment of a damages sum to vindicate the claimant’s interest.

⁵³ Cf. e.g. (in the context of defamation) the recognition of the assertive importance of a reasoned judgment in *Purnell v BusinessF1 Magazine* [2007] EWCA Civ 744; [2008] 1 WLR 1, especially at [29] (Laws LJ) – all of the circumstances are relevant there in determining whether and to what extent there is such an effect.

⁵⁴ Similarly, for example, where quantum is agreed in advance but liability is disputed there is at least acknowledgment by the defendant of the extent of the inconsistency raised with the claimant’s interest; the extent of the detriment.

A helpful contrast can be made with, for example, the quantification of damages under Stevens' substitutive damages concept, likewise said to root in an idea of 'seriousness' (of the infringement of the right).⁵⁵ Seriousness cannot, however, resolve the difficulty noted earlier that the connection or bridge between loss and damages sum on that framework lies only in the paper-thin idea of the claimant being given the money to have because she no longer has the right. Where having the right and having the money are in this way only connected by a motive for payment, the relevance of 'seriousness' of the infringement as the measure is equally minimal.

V. Vindication and assessment inputs

1. Assessment inputs: recap

Thus far, then, we have seen that personal loss can engage vindication (in Varuhas' specialised sense) and that the vindictory statement which would then be involved in a damages award ties loss and assessment together. We now complete the analysis of vindication's fit by turning to the practical fit between vindication and the factors seen to be relevant to actually making a damages assessment. At this point, it will be useful to recap briefly the multitude of inputs to which the operator must be reactive. The first and most obvious of these is, of course, the personal loss fact itself, identified according to the framework in the preceding chapters (and it has been seen above that this loss concept appears in itself compatible with a vindictory assessment concept). There are, however,

⁵⁵ Robert Stevens, *Torts and Rights* (OUP 2007), 78 f. Varuhas is less explicit on quantification, but notes (as regards normative damages awards – i.e. awards where there is no factual loss) similarly that it turns on the seriousness of the interference, combined with the importance of the interest – Jason Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253, 275 ff, 283.

other inputs apparent from damages decisions which ‘will inform the decision.’⁵⁶ The approach is holistic, with all of the relevant factors weighed, and the issues considered relevant by the courts in that regard were discussed in chapter one.⁵⁷

It will be recalled that the most important recent decision on this assessment is *Heil v Rankin*, where the Court of Appeal reviewed damages levels generally and asserted its competence to do so as necessary.⁵⁸ Nothing in the preceding chapters or in the discussion here will (nor is intended to) oust that jurisdiction of the Court to conduct the process of assessment or recalibrate the value figures at play; the framework proposed is just as amenable to judicial analysis as current orthodoxy. Indeed, the flexibility that judicial, rather than legislative, oversight of the matter entails is important for managing the recognition of losses.⁵⁹ Assuming and to the extent that the factors considered by the Court in *Heil* are intuitively sound, then, an assessment operator must be consistent with them.

In brief summary, the factors included as relevant were: assessment by reference to previous awards (including as summarised in guideline tariffs); the value of money judged against the Retail Price Index; life expectancy; public perception of the sums; the effect of the level of awards on insurance markets and public resources (especially the National Health Service); and (to a limited extent) awards made in other jurisdictions. Those explicitly excluded include: the fault of the defendant in committing the underlying wrong; any impecuniosity of the parties and the effect an award will have on their fortunes; the use to be made of the award by the claimant; Gross Domestic Product values and employment indices; tribunal and jury awards and criminal injuries compensation.

These will now be reviewed for the new conceptualisation, considering in each case whether the factor’s inclusion or exclusion from the assessment process is consistent with

⁵⁶ [2001] QB 272, 297 (Lord Woolf MR) (specifically referring to the economic impact of the level of damages chosen, but the sentiment more generally expresses the process here).

⁵⁷ See chapter 1.IV.1.

⁵⁸ [2001] QB 272, 292 ff.

⁵⁹ Cf. e.g. chapters 3.II.2, 3 and 4.II-V.

assessment by reference to a vindication operator (and a detrimental event concept of personal loss).

2. Assessment inputs and personal loss vindication

a) Guidelines and previous awards

It has been made clear time and again that current practice relies extensively on the use of guidelines and previous awards to make assessment decisions. Nothing in the vindication approach would contradict that. Insofar as the fundamental question is the pairing up of serious statement (detriment) and counterstatement (award), data on how this pairing has been seen before is in itself helpful and, as a matter of horizontal justice, vital in ensuring that practice does not become wildly variable. Judges should attempt to develop and maintain a consistent approach to those questions and this can only be achieved by considering what has been established previously. These data serve to maintain consistency and objectivity (and reduce discretion), and in that regard are perfectly consistent with vindication of personal loss viewed from the perspective of a notional observer.

b) The value of money

In regard to the value of money, it is first and foremost of importance that vindication steers clear of requiring any attempt to value or quantify what is lost; the question is what sum of money is required to make a serious statement affirming the existence of the interest at hand. There is thus no need to value pain, or a leg, or distress, or the extent of an infringement of an interest, rather we need to ask what sum, if the defendant is required to

pay it, indicates sufficiently the extent and seriousness of the affirmation of the existence of the interest about which an untrue implication was raised. In this respect, vindication-based assessment is compatible with the ‘personal interests’ basis underlying the personal loss approach. The value of money as an assessment input is, though, to this extent also consistent with the current approach insofar as understanding the seriousness of the vindictory counterstatement depends on the sum whose importance (and thus seriousness) lies in the value it represents. Any representation of the changing value of money (including the presently used Retail Price Index) can serve to represent this facet.

c) Life expectancy.

Life expectancy, by contrast, cannot be seen separately as an input in terms of vindication, but there is in fact no conceptual demand to do so: as discussed in chapter one,⁶⁰ the concern related to the changing nature of permanent injuries and the longer lifespans over which they can be experienced. Under the vindication approach, this will manifest in terms of the implication associated with events of permanent duration and so not as a more abstract idea militating towards the increase in damages because losses are more extensive.

d) Public perception

Equally with regard to the need to account the public perceptions prevailing about awards of particular sizes, the vindication approach copes well. The seriousness of the counterstatement made by an award will naturally be closely associated with general understandings about the size of the award. Likewise, insofar as the sums awarded are still conventional in terms of ‘correct’ by acceptance of them as appropriately serious to match

⁶⁰ Chapter 1.IV.1.a.iii.

the seriousness of the negative implication, the plausibility of that convention will be reliant on perceptions that they are thus appropriate. The new framework is more credible in this regard, meanwhile, than any which relies on a value-based loss. As noted in chapter two, it is not exactly intuitively correct that the reasonable valuation of aspects of a claimant's personhood should be dictated by the particular value a society places on them.

e) The effect of the level of awards on insurance premiums and public resources

With personal loss assessed by reference to vindication, it is also possible to explain why in the assessment exercise the courts have shown what might otherwise be a relatively unexpected fascination with broader social factors. It is straightforwardly true that the seriousness with which a requirement to pay a certain sum of money is imbued will relate to the general economic context, including the value of money and the consequences of selecting a certain size of sum. Unlike compensation, vindication is not so narrowed on replacement, balance and equivalence with the bad that an accounting of the broader social climate looks awkward: in short, social context very clearly informs the seriousness attributed to payment of particular monetary sums, but is much less clearly relevant in informing a 'value' of (at least theoretically) particular aspects of personhood. Whether insurance premiums will afterwards go up, or whether a strain will be placed on public health services by a climate of making particular awards has at best a relatively indirect and tenuous relationship to the supposed value of a lost limb presently before the court and requiring compensation. There is, though, good reason to factor those issues in when the question is what sort of statement a given sum of money in a given context will make to a notional observer in the particular society. Awarding sums which will lead to insurance market-warping effects, or the crippling of public finances for health services, would in all likelihood represent too drastic a counter to any personal loss.

f) Awards in other jurisdictions

Awards made in other jurisdictions were the final input accepted for damages assessment. Under the new framework, they can clearly still be considered relevant insofar, and only insofar, as similar economic contexts pertain in those jurisdictions against which to judge the seriousness of the implication of the sum awarded. Equally, a similar social context is necessary if the jurisdiction is used as a comparator for judging the seriousness of the interest-denying statement raised by the defendant; different societies will have different perspectives on how important different interests or denials of them are. There is therefore no difficulty for discussion here in relevance being accorded to this factor and in that relevance being expressly said to be limited.⁶¹ At the same time, the fact that damages sums in England might differ (even wildly) from those in other jurisdictions again feels intuitively less problematic when seen through the vindication for personal loss lens: whilst it is uncomfortable to suggest that a leg is more or less valuable in England or the United States, those societies can clearly view monetary sums differently in terms of their serious import.

g) The defendant's fault

Continuing through into the excluded factors, it is clear on a framework of vindicating personal loss how the defendant's fault can be dismissed as irrelevant. If the award is aiming to make the defendant reassert the claimant's interest (having implied to a notional observer its non-existence), then the gesture required will be one which objectively (i.e. to the notional observer to whom these implications and suggestions are made) suffices to

⁶¹ Cf. chapter 1.IV.1.a.vii.

make the assertion that it exists. The level of fault involved in the wrong which generated the liability and caused the detrimental implication does not determine the extent of that problematic implication and has no bearing on how the interest can be affirmed. It therefore has no place in assessing the size of damages sum required to make the affirmative response.

If there are, exceptionally, situations where the defendant's conduct is so egregious that contributes to distress suffered and so to the implied disparagement of the claimant's interest (as perceived by the notional observer), then this would fall within the province of aggravated damages according to the leading understanding of such awards, which views them as a recovery for distress caused by the particular manner in which a tort is committed.⁶² This would place them as personal losses, though exceptional ones insofar as conduct must only exceptionally be considered to itself contribute to distress and thus to the seriousness of the detrimental implication raised.

It is admittedly uncertain whether such awards are actually available in negligence, with no case having ruled on the point.⁶³ This is not important for present purposes – a value judgment simply needs to be made as to whether negligent conduct can or cannot (exceptionally) be serious enough to warrant the interpretation (from the perspective of the notional observer) contemplated. This says nothing for the underlying structure for personal loss, which can equally well accommodate either a general or total exclusion of conduct from the assessment analysis (and the possible exceptional aggravated award as distress). Certainty over that answer should, though, of course be sought.

h) Impecuniosity and the effect on the parties

⁶² See e.g. Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, para 1.8; W Edwin Peel and James Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014), para 23-024; Paula Giliker, 'A "new" head of damages: damages for mental distress in the English law of torts' (2000) 20 LS 19.

⁶³ It has been considered arguable: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962, [101] (Lord Neuberger).

As far as the exclusion of financial circumstances (and vindication's compatibility with it) is concerned, there are some complications which require the separate treatment of claimants and defendants. The former's financial circumstances are indeed always going to be irrelevant on a vindication approach, because they do not impact on the quality of the counterstatement effected by the award made against and paid by the defendant, and equally do not alter the size of the detriment suffered which determines the payment. The inconsistency between implication and personal interest is not altered by any question of the claimant's finances (in themselves). It thus does not matter whether damages awarded represent an extravagant or paltry sum as far as the particular claimant is concerned. 'A multi-millionaire...will get no comfort or support, which his existing resources do not provide...The money will mean little or nothing to him, but this is no grounds for denying him his damages.'⁶⁴ This factor is to this extent rightly excluded from consideration by present practice.

The defendant's circumstances likewise make no chance to the seriousness of the detriment suffered by the claimant. They might, however, be thought to alter the seriousness of the counterstatement made by an award. That is, it is not outright inconsistent with the vindication concept to factor in the defendant's wealth – one could assess the gesture more subjectively on the basis that it is generally understood that a pauper makes a more serious gesture than a prince per pound paid. However, to decline to account the defendant's circumstances, as current practice maintains, is equally not inherently inconsistent with vindication – the question is simply of the extent of the circumstances known to the notional observer. The courts' current stance can be supported if one maintains that this observer just does not know the financial circumstances of the parties, rather only knows of the loss events and the claimant's interests as protected by the

⁶⁴ *Croke v Wiseman* [1982] 1 WLR 71, 84 (Shaw LJ).

law. If, on that basis, the objective observer would consider £100,000 a serious statement to reassert a bodily integrity interest denied in the breaking of a leg, it is irrelevant whether a particular billionaire defendant views the sum as small change; the same is true as of the claimant's financial situation. The only relevant point is what to the notional, reasonable observer, who knows nothing of the parties' positions, in the context of the society in question represents a sufficient gesture.

In favour of that latter (current) position, it might also be argued that it maintains a critical focus on the claimant and her interest-related detriment, rather than allowing considerations related to the defendant to corrupt the thinking. (In this regard in particular, vindication can be contrasted with operators such as punishment⁶⁵). In any event, vindication continues to fit consistently with the courts' intuitions about what is relevant is assessing damages.

i) The use to be made of an award

Vindication for personal loss is conceptually equally accommodating of the exclusionary rule in relation to the use to be made of a damages award in assessing that sum. Insofar as the focus is on the extent of the counterstatement, no relevance can be accorded to what happens to the materials (the money) used to make the statement. This is a much clearer and more natural answer than is provided by orthodoxy, where compensation focuses on repairing the claimant's position, such that use (or at least usability) of an award would seem to attract importance despite this being denied in practice.⁶⁶ Vindication is thus consistent with practical intuitions and equally resolves a core tension in the conceptualisation of the remedy.

⁶⁵ On which see below, VI.3.

⁶⁶ Cf. chapter 1.II.1. It is the basis of much of the disagreement throughout e.g. *West v Shephard* [1964] AC 326.

j) GDP and employment indices and tribunal, jury, and criminal injuries awards

In regards to the use of broader economic metrics and comparison to other systems of award for the assessment of damages sums, the vindication approach offers no better or worse a fit than the current position – the issues as discussed earlier are fundamentally whether the value of the money awarded is to be understood by reference to simple and clear indices, or by a more comprehensive or uncertain range of others, and whether the assessment of damages in this area within the tort is seen as a closed system or else one to be integrated into a broader system.

The latter boils down to whether consistency needs to be achieved across all areas of the law asking similar questions. This may be desirable, and moving to incorporate such ideas would be possible under a personal loss vindication approach, provided that the other areas involved were not committed to alternative operators (thus a comparison to criminal injury ‘compensation’, literally understood, would be inappropriate) and sufficient regard were paid to precisely what is important in making the assessment: the seriousness of the statement/detriment and the seriousness of the counterstatement/award. The index point above, meanwhile, again relates to a simple policy choice as to how involved an understanding of the value of money the court is willing and able to gather; vindication neither helps nor hinders in making that choice.

3. Assessment inputs: review

In respect of these assessment inputs, then, vindication bridges the awkward gap between a focus on what has happened to the claimant and what the defendant must do. It was seen in chapter two that the progression from what is lost to what must be paid cannot function in

the usual way under the compensation for diminution in value approach because there is no way to place value on the loss except in terms of what must be paid;⁶⁷ by contrast, vindication for personal loss provides room for this in the parallel accounting of seriousness between statement (detriment) and counterstatement (award). As will be discussed further below, compensation also struggles to explain the inclusion and exclusion of various input factors; it is clear from the list above that more is required than a simple focus on what has happened to the claimant. The conventional idea of lost value can only very tenuously explain the relevance of financial impact on the National Health Service, for example, and the proposed solution again resolves this in the parallel accounting structure: some of the inputs relate to detriment (what is loss), some to the award sum (what is to be paid), and the considerations required in determining the seriousness of each of those will differ. This division is discussed further in chapter six.⁶⁸ The proposed approach also makes clear the normative relevance of the remedy: it dispels a negative implication about the claimant's interest which was raised by and has existed since the relevant loss event. There is thus no flawed attempt to make good a complete and incurable past harm.

To conclude this section, it has been seen that within the framework of personal loss remedies in the tort of negligence, vindication as the affirmation of the claimant's interest is suited to serving as an operator driving the assessment of a damages sum. The concept can engage with the personal loss approach adopted in the earlier chapters of this thesis, and is consistent with the input features in the assessment exercise identified in chapter one. The focus of the idea is on producing a statement affirming the existence or content of the claimant's personal interest where the size of a damages award will be set to indicate seriousness matched with the seriousness of the detriment in the detrimental event (i.e. the

⁶⁷ See chapter 2.II.1.

⁶⁸ See especially chapter 6.II.1.b, 6.II.2.

extent of contradiction between the implied statement raised by the loss event and the claimant's actual interest). The concrete practice of assessing the detriment for this purpose will form the subject of the next chapter. For the remainder of this chapter, it will be demonstrated that vindication is in fact more suitable than other potential operators, and on this basis the next sections will take prime candidates in turn to see how they fare against the criteria already identified.

VI. Inadequate alternatives

1. Compensation

The obvious place to begin to evaluate vindication's competitors as operators for the assessment is the traditional mainstay of compensation. As has been noted numerous times, it is the foundation of much of the modern thinking around damages and has been used as an inapt driver for understanding loss. Here, it will first be analysed against the personal loss framework proposed and the assessment factors considered relevant in its core, orthodox sense and then in broader understandings.

a) Compensation in the dominant understanding

The core, traditional feature of compensation which we identified earlier in this thesis⁶⁹ is that it represents a replacement of value, in the sense that the award made should be made equal to the value of the loss. The intention is thereby to leave the victim in the (value) position she would have been in but for the tort. It is clear that this is tempered. It is tempered first in respect of precision: compensation is seen as an imprecise form of value

⁶⁹ See chapter 1.II.1.

replacement with non-pecuniary loss, given that definitive calculation of a value was not possible.⁷⁰ This produces the idea that estimation of a fair and reasonable sum for the defendant to be required to pay was the target of the enquiry. It is secondly tempered in respect of its success as replacement: given that money cannot really replace a non-pecuniary harm, especially with such examples as a lost leg or a complete past experience of pain.⁷¹ These issues lead to a great deal of conceptual difficulty with respect to loss. It was seen that compensation as a whole begins to look unfortunate but is generally adhered to regardless for want of a better existing alternative – with a qualifier such as ‘notional’ or ‘theoretical’ added to the label.⁷² In the recently published words of David Campbell, for example, (speaking on the personal injury context): ‘...the quantification of damages...always bears only a very weak relationship to compensation and, in regard of non-pecuniary loss, no relationship at all.’⁷³ That radical admission should be surprising given orthodox theory.

Introducing the personal loss approach, those difficulties with the traditional understanding of compensation as value replacement, as a balancing of the scales, become yet more pronounced. This is unsurprising given that the key imperative in articulating the personal loss concept was to engage with and respect the idiosyncratic features of non-financial detriments, exactly the features which jar with a pecuniary loss-derived compensation concept. Far from merely entailing imprecision when isolating the value of loss, loss is now (because it must be) a value-less concept – here the occurrence of a detrimental event. One cannot replace value where there is no lost value to be replaced. Equally, far from simply falling short in achieving replacement, a monetary sum cannot replace a loss understood in the personal loss sense. The idea of replacing an event makes

⁷⁰ See chapters 1.II.3.

⁷¹ See chapter 2.II.2.

⁷² See in particular chapter 2.II.4.

⁷³ David Campbell, ‘Interpersonal Justice and actual choice as ways of determining personal injury law and policy’ (2015) 35 Legal Studies 430, 434.

no sense at all – events in this sense cannot operate like a store of wealth, where the final, consequent sum is the only critical issue; events simply happen or do not happen and a later event will not change that fact. To consider the ‘detriment’ aspect of detrimental events, meanwhile, a concept framed about replacement is equally unworkable, given that the implied denial of the claimant’s interest(s) cannot be unworked retroactively, and there is a positive implication to be refuted rather than anything to be replaced. In short compensation cannot engage a value-less event loss in any relevant sense. Any sum of money given on that pretence will come to the claimant as a normatively unconnected boon. It has been argued that this same pertains with the current non-pecuniary loss framework given the existence of the problems with compensation just discussed⁷⁴ (with the added complication of the imposition of monetary value), but rather than follow that argument in rejecting recovery for non-financial harms, this thesis of course argues that the new personal loss concept proposed opens up vindication as a viable operator, as discussed above.

b) Compensation understood more broadly

It must, however, be recalled that a number of broader conceptions of the idea of compensation have been developed by various authors; conceptions focused on aspects such as balance or restoring a status quo, rather than a strict idea of value replacement. Whilst it is argued that the section immediately above is sufficient in light of the rest of this thesis to unseat the orthodox damages concept of compensation for diminution in value in favour of personal loss vindication, some time here should be devoted to these alternatives.

⁷⁴ See Bruce Chapman, ‘Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice’ in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995), discussed in cap. 2.II.2 and reaching the conclusion that no award can thus be made (Chapman seeing no viable alternative).

In the earlier sections of this thesis, multiple references have been made to the idea of theoretical or notional forms of compensation. Similarly, Tilbury has noted (in the context of the Australian courts) a tendency to expand the term ‘compensation’ to such a point that more fits within it, there focusing on consolation and solatium (discussed separately immediately below precisely because it is a very different idea to compensation) as an example of this.⁷⁵ Damages are thus said to be awarded ‘because of’ and not ‘for’ the relevant detriment.⁷⁶ There is, though, an essential difficulty with trying to manipulate a compensation idea this way in our present context. Fundamentally, such a re-analysis must work by abstracting the idea of compensation until it is sufficiently broadly conceived to encompass both the narrow value replacement idea which functions without excessive conceptual difficulty in the value-centred, quantitative world of pecuniary loss, and an idea of what response may be given to the value-less, qualitative personal loss. That sort of approach is disingenuous, still leaving a conceptual gap: even if broad-brush ‘compensation’ or ‘correction’ is the abstract category, we still do not know what the narrow-focus idea actually capable of guiding assessment in practice is for personal losses (as the equivalent for the narrow-focus form of compensation for pecuniary loss). It will be seen below that the specific ideas of solatium or consolation cannot in any event be convincing⁷⁷ (and nor can Tilbury’s own suggestion of a function termed ‘satisfaction’, again discussed below⁷⁸).

Another example of this sort of understanding exploits the ideas of equivalence and balance. Zavos discusses what exactly counts as balancing out/equivalence to produce a

⁷⁵ Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 720 f. See also Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-07. Cf. Eric Descheemaeker, ‘Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 79 ff in re the use of solatium to whitewash over conceptual problems in the context of non-financial harms.

⁷⁶ Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 720 f, citing Windeyer J in: *Teubner v Humble* (1963) 108 CLR 491, 507; *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 150.

⁷⁷ See below, VI.2.

⁷⁸ Below, VI.4.

theory which might seem close to personal loss vindication as proposed in the current thesis. Zavos' theory works primarily to solve a distinctly American problem (lack of guidance to juries for setting damages sums⁷⁹) but to do so revamps the concept behind non-pecuniary loss recovery. He argues that compensation works on two levels – 1) the factual compensation of loss by money-replacement and 2) atonement/rebalancing in the legal relationship (by the defendant paying damages and thus demonstrating respect for the loss caused). With pecuniary losses, Zavos argues, the payment of the equivalent sum of money achieves both; with non-pecuniary losses, the first is impossible, but the corrective to the legal relationship is still possible because offset or rebalancing in that legal sphere do not require precise equivalence.⁸⁰ This is unsatisfactory in many respects, of which two can be highlighted in particular. First and foremost, by refining the assessment idea without refining loss, it still acknowledges detriments which it then does not correct: for Zavos non-pecuniary loss exists on the factual and legal levels, but is rebalanced in only the latter, pecuniary loss in both (thus pecuniary loss is also accorded higher status). My system, by contrast, defines loss differently in those two cases (in accordance with their different characters), such that harm is fully articulated and then receives a full, matching response (counterstatement to statement for personal loss). Secondly, Zavos' assessment framework is left with no new aspect of loss to guide the 'rebalancing', which can then only be achieved by identifying the severity of the injury relative to the most serious injury, and then awarding a monetary sum proportionately with a sum for that most serious injury set by the legislature.⁸¹ In this way, legislative input is required because the sums themselves take on no non-relative meaning. Under the personal loss theory, the sums are judged by the seriousness of the statements they make (i.e. they have independent

⁷⁹ Harry Zavos, 'Monetary Damages for Non-monetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Non-economic Damages' (2009-2010) 43 Loy LA L Rev 193, 199 f, 250 ff.

⁸⁰ Ibid, 240 ff.

⁸¹ Ibid, 262 ff.

meaning), which engages the parallel statement inherent in personal loss.⁸² Merely abstracting compensation somewhat, as Zavos does, thus does not produce a rigorous framework for assessment.

In truth, the vindication idea relied on in this thesis clearly could be subsumed by a broader notion of correction insofar as it sets right the relationship between the parties. Yet a more concrete framework is still then needed and any number of non-compensation-based assessment processes might qualify as instantiations of correction in this very abstract sense. No guidance is achieved by framing a corrective idea so broadly that it encompasses a wide range of processing mechanisms for producing a remedy. There is, therefore, value in focusing on the vindication idea.

2. Solace and solatium

Moving beyond compensation, then, we may consider the alternative, briefly noted in the last section, of solatium. It is frequently the case that, where non-pecuniary loss damages are understood to achieve something distinct from compensation as conventionally understood, they are labelled as such a payment; a means merely to make the claimant feel better. We have noted in earlier chapters that this idea is often (though not invariably) closely associated with suggestions that the loss in question is of happiness (or something similar),⁸³ and that it appears surprisingly frequently despite its opposition to much of the orthodox approach and a lack of clarity over its meaning when drawn into service in

⁸² Whilst this is of course informed by other injuries and damages decisions, the process can work without them; cf the discussion in chapter 6.II.

⁸³ See chapter 2.IV.2. Cf. chapter 1.III.2.

England and Wales.⁸⁴ In the words of Descheemaeker, the term is used in a ‘sparse’ and ‘haphazard’ way in this jurisdiction, and often in relation to emotional distress.⁸⁵

A relatively recent example can be seen in Lord Hoffmann’s speech in *Chester v Afshar*.⁸⁶ There his Lordship frames the argument in terms of a ‘case for a modest solatium’, but by that seems to mean a conventional sum, especially given that he rejects the idea on the basis that the sorts of risks involved would differ significantly and so make identifying a fixed figure difficult.⁸⁷ His Lordship also then refers to the same as ‘modest compensation.’⁸⁸ In *Croke v Wiseman*, as a contrasting example, Shaw LJ recognises compensation as the basis for an award which he reluctantly makes, appending the observation that this recovery for non-pecuniary loss is hard to justify where it offers no solatium to the claimant and is of no practical use.⁸⁹ Solatium (and the provision of useful facility to the claimant) is thereby rendered distinct from compensation insofar as it seems to describe the desirable practical effect of actually making a claimant feel better and it is also clearly not intended as a necessarily fixed sum. In many instances, the temptation to use solatium terminology arises specifically because of overtones of rights-centred thinking where autonomy interests are at stake and more conventional damage and loss ideas fall away.⁹⁰ This is consistent with Descheemaeker’s portrayal of the history of ‘solatium’ in England – entering our discourse via recovery through naturally exceptional death cases.⁹¹ There too we might see a relationship to conventional figures.

In any event, the important question now is whether these ideas of solatium at play in England are capable of addressing personal loss conceptually. On that issue, it is first and

⁸⁴ See e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-07.

⁸⁵ Eric Descheemaeker, ‘*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 67.

⁸⁶ [2005] AC 134, 147 ff.

⁸⁷ *Ibid*, [34].

⁸⁸ *Ibid*.

⁸⁹ [1982] 1 WLR 71, 83 f.

⁹⁰ Cf. *McFarlane v Tayside Health Board* [2000] 2 AC 59; Oliver Radley-Gardner, ‘Wrongful birth revisited’ (2002) 118 LQR 11, 13.

⁹¹ Eric Descheemaeker, ‘*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship’ in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 75 ff.

foremost not clear with personal loss (as with non-pecuniary loss, in fact) what the relevance of solace or making the claimant ‘feel good’ or ‘feel better’ is when it is not necessary that the claimant actually feels particularly bad or bad at all; indeed the claimant need not feel anything. This issue was discussed in chapter three in terms of establishing, pace Descheemaeker, that there was disjuncture between the engagement of emotional integrity and physical integrity or autonomy.⁹² That author is wrong to understand loss as necessarily involving an interference with happiness and to compel reference entirely to happiness or entirely to non-experiential events. For those losses which root in experience, such as pain or distress,⁹³ it would be easy to presume that there would be an inherent element of the claimant ‘feeling bad’ about the loss, but even here this would be too simple. On the personal loss approach, the claimant has a remediable loss in the occurrence of pain even if, for example, she happens to be a masochist who ultimately enjoyed the experience, because her enjoyment does not alter whether the infliction of pain raises an implication from the perspective of a notional observer that she has no contrary interest⁹⁴ in emotional integrity/inviolability. Practically speaking, a claimant will presumably not bother to frame a claim in respect of an event about which she does not feel badly. That is no argument as to the theory, however, and there are also still (hardly uncommon) circumstances where claims can be raised without the tort victim’s awareness or consent and regardless of her feelings. Once again, the most obvious anchor point here is the case of an unconscious claimant, and it is easy to add in any claim raised for the estate of a deceased person or on behalf of someone lacking capacity. Moreover, and particularly where it is not by definition essential that the claimant ‘feels bad’, it is not clear how creating a present positive feeling by an award of money is of any moral relevance as a remedy for past unhappiness. The connection between the good feeling following an award

⁹² See chapter 3.II.3.a-c.

⁹³ See particularly chapter 3.II.3.b.

⁹⁴ Or at least has no interest extending as far as relevant here.

and the (complete) loss prior to award is unclear. This argument has appeared time and again in respect of orthodox concepts.⁹⁵ In short, any distress etc. over the loss is dispensable, the core component of the loss is objective (the implied suggestion to the notional observer that the claimant's interest did not exist [to that extent]), and happiness is subject to natural, internal adjustment; collectively these are fatal to solace engaging personal loss.

Furthermore, and an argument in respect of which it is possible to agree with Descheemaeker on the happiness issue, is that the idea of making the claimant feel better is ambivalent as to how and why that is achieved. That author outlines this in terms of claimants potentially coming to feel better through being compensated or through a tortfeasor being punished,⁹⁶ and concludes from (inter alia) that that solatium is obfuscatory and unhelpful.⁹⁷ Certainly very different awards could result. As noted below in the context of punishment, damages awards generally might always seem to service both compensation and punishment,⁹⁸ but at least on an orthodox compensation approach there is a clear preference for one operator which consistently directs the resultant assessment (or would if value replacement could engage value-less loss), where solatium in itself could give no such guidance. Meanwhile, if we were to take the use of solatium as a clumsy shorthand for conventional sum after the fashion of Lord Hoffmann referred to above, we arrive at a similar problem; it is still equally difficult to see what usefulness it has as an assessment operator for personal loss damages. The sum on that basis does not need to achieve or represent anything – it just indicates that any sum of a set size suffices, which would leave an assessor free to select any arbitrary sum. That is not concordant with

⁹⁵ See e.g. above, VI.1 and chapter 2.II.2; Bruce Chapman, 'Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice' in Owen, DG (ed), *Philosophical Foundations of Tort Law* (OUP 1995).

⁹⁶ Eric Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in Scott, H and Descheemaeker, E (eds), *Iniuria and the Common Law* (Hart, 2013), 80 ff.

⁹⁷ Ibid, 82.

⁹⁸ See below, VI.3.

intuitive understandings about responses to wrongdoing, however, insofar as we certainly can identify sums which are patently too high or low to represent a response.⁹⁹ The imperative to achieve consistency alone is not sufficient to guide an award.

All of this is not to say that the concept of a solatium does not carry some useful idea into the discussion. There is much to be said for the fact that the idea in all its uses seems to be explicitly prospective, for example. Rather than claim that there is any correction of a past, complete and unalterable personal loss fact, the solatium is openly operative from the point of its receipt onward (an improvement if only it also demonstrated some connection to past facts). In this way, the idea is moulded to a key feature of personal loss identified earlier. Despite any interesting and important conceptual connections it entails, however, the fundamental nature of a solatium idea cannot respond to personal loss understood as detrimental events. As promoting good feelings it does not accurately map onto the loss concept or guide assessment, and as a simple imperative to award conventional sums it generates consistency but nothing more.

3. Punishment

It seems perfectly clear that punishment is no proper aim of the tort of negligence or torts at all except to the limited (especially given the *Rookes v Barnard* decision¹⁰⁰) extent that exemplary damages recovery is permitted. Thus, even where commentators begin from a premise that common law systems, unlike their civilian neighbours, retained a private law concept of punishment, this is treated entirely in terms of exemplary damages awards.¹⁰¹

⁹⁹ E.g. Peter Cane (ed), *Atiyah's Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1.

¹⁰⁰ *Rookes v Barnard* [1964] AC 1129.

¹⁰¹ See e.g. Allan Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in Rickett, C (ed), *Justifying Private Law Remedies* (Hart 2008).

Such awards fall beyond the proposed theory of personal loss and respond very clearly to particular behaviour rather than to loss.¹⁰²

Nevertheless, it is surprisingly often the case that punitive overtones are seen in the award of non-pecuniary loss damages. It is possible to find very aged recognition of a split purpose in any award of monetary damages, with a sense that where (out of impossibility) compensation falls away, what remains is a punishment. In the words of Lord Kames: ‘The sum is taken from the one as a sort of punishment for his fault, and is bestowed on the other to relieve him from the loss he has sustained. But there are numberless instances, where the mischief done admits not an equivalent in money; and in such instances, there is no place for reparation except with relation to its first end.’¹⁰³ Similarly, in the *Theobald* case, Pollock CB disclosed that he regarded an award ‘not so much as a means of compensating the injured person as of damaging the opposite party.’¹⁰⁴ This punitive sense remains prevalent amongst a number of modern authors; consider, for example, Cane’s sense that the award of non-pecuniary loss damages necessarily has an ‘air of punishment’.¹⁰⁵ This concern about and attention focused on a punitive tone is hardly surprising given the failure of the non-pecuniary loss framework to present a conceptually plausible alternative interpretation. As has been clear throughout this thesis, there is no possibility of effective compensation and this fact combines with a limited appreciation of further potential purposes to leave punishment. Ideas like vindication are, as suggested above, relatively newly emergent.

It represents an underestimation of the importance of the losses involved, however, to abandon a focus on the claimant’s loss in favour of concentrating on a reaction to the

¹⁰² See e.g. *Rookes v Barnard* [1964] AC 1129; Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 13-017, 13-021.

¹⁰³ Lord Kames, *Principles of Equity* (2nd edn, Millar, Kincaid and Bell 1767), 28.

¹⁰⁴ *Theobald v Railway Passengers Assurance Co* 156 ER 349; 26 Eng L & Eq R 432, 438.

¹⁰⁵ Peter Cane (ed), *Atiyah’s Accidents, Compensation and the Law* (8th edn, CUP 2013), para 6.5.1. Cf. *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin): it is often not clear if a certain part of an award is for compensation or punishment.

defendant's behaviour. Focusing on the effect to be experienced by the defendant as a result of the award likewise does little to aid the personal interest of the claimant which stands under a cloud. Equally, any deterrent effect which one might argue results from the imposition of punishment applies only beyond the instant case. Again, it does nothing for the threat to the personal interest. Turning from the personal loss concept itself to the practical assessment factors discussed above and drawn from the Court of Appeal's approach, meanwhile, though punishment demonstrates a remarkable similarity to vindication in its compatibility with the factors included in analysis, the same is not true of the issues excluded from consideration.

One of the most obvious disjunctures would be the inability of a punishment concept to explain why an assessor should exclude, for example, the level of the defendant's fault from the enquiry. It is clear that the specifics of the conduct of the defendant are, for example, critically important in the context of exemplary damages, which clearly are punitive of particularly bad conduct.¹⁰⁶ A punishment should obviously relate to the extent of the wrong more closely than is demonstrated by what the courts have felt are important considerations in the assessment of damages for non-financial losses in private law negligence.

It is not all doom and gloom for punishment, though. It would go some way to giving a reason for the relevance of public perceptions of the award, and of the fairness of the award to the defendant (rather than merely to the claimant in respect of the loss), and likewise make clear why the use a claimant will make of the award is of no consequence: because it clearly turns the question away from improvement of the claimant's lot to making sure the defendant has done what is required. In this way punishment clearly does needle at some defendant-related issues which sit less comfortably in the orthodox

¹⁰⁶ See e.g. *Rookes v Barnard* [1964] AC 1129; Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), paras 13-017, 13-021.

framework focused in theory exclusively on the value of loss suffered. Nevertheless, given the foregoing it remains clear that punishment is no solution in the search for an assessment operator.

4. Satisfaction

A note was made above of the initial suggestion made by Tilbury of a satisfaction notion as a new and unexplored function of the law of remedies. That author draws the idea from systems beyond the Common law world, where a notion of ‘satisfaction’ serves the same basic aim (making good a wrong) as pecuniary compensation where the latter cannot engage a non-financial loss.¹⁰⁷ The term is not new to the Common law, however, and was seen by e.g. Hobbes as a purpose of damages.¹⁰⁸ Satisfaction payments, or other remedial orders, such as a judicial declaration or mandated apology, serve to ‘assuage the injured party’s violated sense of justice’.¹⁰⁹ This cannot operate without appreciating that the loss concept has changed (or at least that the pragmatic pretence discussed earlier is dropped¹¹⁰) – for such purposes, Tilbury is seeing loss as a qualitative, non-value idea (as indeed personal loss is seen in this thesis is). A violated sense of justice or dissatisfaction is no part of the definition of the loss, however, and assuaging such a violation or feeling is not compatible with the balance of assessment factors considered relevant. A sense of justice is not necessarily assuaged by reasonable sums or mediated by broader economic context. It would seem too objective. Further, a sense of justice is certain to be affected by the extent

¹⁰⁷ An example, recently enacted, would be the Czech Civil Code of 2012, which provides in § 2951 (2) that damages for immaterial loss are made as reasonable satisfaction; see Jiri Hradek and Andrew James Bell, ‘The New Czech Civil Code and Compensation for Damage: Introductory Remarks and Selected Provisions in Translation’ (2016) 7 JETL 300, 305, 322.

¹⁰⁸ See David Ibbetson, ‘Tortious Damages at Common Law’ in Gamauf, R (ed), *Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart. Symposium zum 80. Geburtstag von Herbert Hausmaninger* (Manz Verlag 2017), 102. The term has not formed part of the modern lexicon, however, as should be clear from the dominance of compensation seen in chapter 1.

¹⁰⁹ Michael Tilbury, ‘Reconstructing Damages’ (2003) 27 Melb U L Rev 697, 721.

¹¹⁰ See chapter 2.II.4.

of the defendant's fault in the wrongdoing – though this is accounted in systems which address satisfaction,¹¹¹ it is contrary to Common law principle. Similarly, damages would have to be unavailable to unconscious claimants, despite the opposite being the committed, intuitively sound position of the courts (Tilbury himself sees this as an advantage¹¹²). Perhaps less controversially, one might equally consider a patient who lacks, or comes via the events in question to lack, understanding of the wrong (though is aware of pain etc.); such a claimant will have no violated sense of justice to assuage, but a nil sum in damages would seem wrong.

Personal loss itself is also not engaged by a satisfaction notion of this sort. *Inter alia* it does not speak to the implied statement about the claimant's interest; it reduces losses to experience of them where not all are experiential;¹¹³ and it fails to explain the relevance of the twin injuries and events ideas (where neither necessarily correlates with a 'violated sense of justice'). Satisfaction has historical charm, engages with the value-less nature of personal harms generally, and moves beyond simplistic divisions between compensation and punishment. The conceptual problem needing resolution here extends, though, to the understanding of loss itself. That loss understanding must drive the assessment response, but satisfaction is not driven by personal loss as outlined in this thesis.

A certain similarity also exists between the concept and other ideas of satisfaction, including one raised by Goldberg, who discusses a notion of fair compensation (as opposed to full) as a manifestation of a satisfaction idea of a similar sort.¹¹⁴ The same problem discussed above arises – abstracting compensation to sweep together responses to two very different forms of harm is practically unhelpful, and the result hardly touches the full

¹¹¹ To take the Czech example above again, the Civil Code provides in § 2957 that the amount awarded as satisfaction is determined by the circumstances, including whether the harm was intentionally caused or there was a threat or deceit. See Jiri Hradek and Andrew James Bell, 'The New Czech Civil Code and Compensation for Damage: Introductory Remarks and Selected Provisions in Translation' (2016) 7 JETL 300, 305, 323.

¹¹² Michael Tilbury, 'Reconstructing Damages' (2003) 27 Melb U L Rev 697, 721.

¹¹³ Cf. chapter 3.II.3 (especially b).

¹¹⁴ John Goldberg, 'Two Conceptions of Tort Damages: Fair v Full Compensation' (2005-2006) 55 DePaul LR 435.

extent of the conceptual difficulty in moving from personal loss to a monetary sum. Whether a sum is intended as ‘fair’ or ‘full’ finesses assessment itself, but this does not resolve the further problem that assessment must move from and engage with the loss as identified if it is to be a remedy. Simply providing *something* to the claimant because the claimant has suffered something else is not enough.

5. Relative inadequacy

At this point then, having discussed the key ideas which have dominated the discussion of damages awards, the diversion can be brought to an end. It may be said in summary that none of the operators contemplated in this section, despite their pre-eminence in discussions of damages to this point, is capable of properly directing the process of converting a personal loss fact into a damages sum. Each of the candidates falls short of engaging our understandings about what should be relevant in that process as those have found expression in the courts. The more claimant-focused operator of compensation cannot explain the awkward non-claimant-focused aspects of our thinking, nor properly engage with a loss concept which eschews value diminution. On the other hand, defendant-focused ideas like punishment are fundamentally at odds with civil damages inasmuch as damages remedy loss not misconduct. Something like solatium (generally seen as claimant-focused, but technically ambivalent) falls short simply for the quite separate reason that a good feeling in the claimant is unrelated to the loss suffered, a flaw equally found in any notion of satisfaction.

As a consequence, it is fair to conclude that vindication should serve as the focus of personal loss recovery insofar as it is demonstrably superior to these other contemplated operators in this regard. A demonstration of vindication’s fit in directing the operation of the assessment process, however, does not serve to dismiss all other functions from the

arena entirely. It is perfectly clear that multiple effects can be achieved by an award, even where those are not part of the primary, driving aim by which monetary assessment is conducted. In particular, vindication is not inherently inconsistent with a claimant being consoled or satisfied by the receipt of the ultimate sum of money (though it is achieved where, for instance, consolation or satisfaction cannot be). Good though it certainly is when an award makes a positive impact on the claimant's life, this is an incidental effect. By the same token, a core focus on vindication is consistent with a defendant experiencing a punitive effect insofar as she has to pay the specified sum (though vindication is achieved even where the defendant is, for instance, insured and feels no impact).

The exception to this is, naturally enough, compensation in its narrow sense of value replacement. Insofar as that could only ever be achieved 'notionally' with non-financial and invaluable detriments,¹¹⁵ it seems clear that it could never be achieved as an incidental effect alongside an underlying servicing of a vindicatory purpose.

VII. Conclusion

By contrast with the poor showing offered by other candidates, the specialised sense of vindication proposed by Varuhas provides a form of middle ground which engages the qualitative, value-less and interest-focused nature of personal loss as a detrimental event as outlined in this thesis, as well as the other factors for assessment as accepted or excluded by the courts. It provides the means to hone in on the claimant and social- or defendant-facing issues at the same time, and is reactive to the defining characteristics of event-based personal loss as an event raising a detrimental implication. This operates on the micro-level of the personal loss damages award, saying nothing for the macro-level function of negligence as a whole. In contrast with Varuhas, it has been argued that supposedly

¹¹⁵ E.g. *Rushton v National Coal Board* [1953] 1 QB 495, 502 (Romer LJ). Cf. generally chapter 2.II.4.

‘compensatory’ damages already represent a general framework for vindication-based recovery in negligence; this fact is simply not properly recognised by orthodox theory.

Other candidate functions may ultimately be achieved in effect by the award of damages, but those cannot be the central figures in the assessment of the award. Compensation’s focus on value replacement, or more broadly on vague ideas of correction or balance unable to guide a particular award, cannot properly engage personal losses as in themselves incurable past losses. Though generally regarded as the cornerstone of damages recovery in negligence (to the extent that it permeated the entire remedial enquiry and corrupted our loss thinking), it is in fact an aim which, at least in its narrow sense, has no place here. Punishment would require the input of additional factors broadly considered inappropriate in damages assessment, meanwhile, and solatium or satisfaction cannot engage loss which is not in some way experienced.

With vindication thus in place as the preferred assessment operator, we can turn in the final chapter to the actual operation of the assessment process to complete this reanalysis of personal loss damages recovery.

Chapter 6 – Assessing Damages to Vindicate for Personal Loss

I. Introduction

Given the introduction of a vindictory assessment concept in the preceding chapter, and the demonstration that conceptually personal loss and the factors generally considered relevant to assessment of a damages sum are compatible with it, it is now necessary to complete the overall damages thesis by carrying this forward into an analysis of the operation of the assessment process on the new proposal. The reconceptualisation of loss developed in the earlier sections of the thesis¹ will be brought together with the vindication aim² to produce an outline sketch of how assessment would function under this framework as a whole. Comparison will be made throughout to the unsatisfying dominant theory outlined in chapter one. During the course of this overview of the consequences of the reimagining, emphasis will be placed on the concrete differences in practice entailed by the new conceptual structure.

Vindication-based damages assessment for personal loss will be shown to be conducted through parallel judgments made on the seriousness of the statement implied by the detrimental event loss and the seriousness of the counterstatement made by a damages award. It is this parallel which, unlike the conversion processes in other theories, allows the progression from loss to monetary figure despite loss being non-monetary. The seriousness of the detriment will be understood by reference to the loss event and its effects as they appear at the point of assessment and by reference to the understanding of the notional observer during the period when the implied statement is allowed to exist. This perspective, unlike orthodoxy, places guiding limits on the understanding of detriment

¹ See chapters 3, 4.

² Chapter 5.

and equally facilitates a nuanced approach to multiple and deteriorating injuries. The result of the process can remain, as on the orthodox framework, a lump sum, but this must be understood by reference to the particular interests of the claimant rather than as a single sum. The award of interest, meanwhile, must take on a very different role as reflecting a substantive aspect of the loss, which in turn must alter the terms of its being awarded. Finally, the framework provides a firm conceptual basis for and encourages appellate oversight of the recognition of detrimental events, as well as of the ranges of damages figures seen to be appropriate.

II. Applying the assessment factors

In this section, there will be discussion of the practical implications involved in assessing an award of damages for a detrimental event loss for the assessment factors identified in the last chapter, as well as in respect of a number of further issues which have arisen at other points as items for consideration here. Unlike the discussion in respect of the compensation for non-pecuniary loss theory,³ the discussion of assessment and assessment factors needs to be split into two distinct and parallel questions – the detriment raised by the loss event (i.e. the seriousness of the inconsistency between the claimant's interests as protected and as insinuated by the defendant) and the seriousness of the statement made by particular sums of money when awarded as damages.

1. Detriment and its seriousness

a) Recap: binary event and non-binary detriment

³ Cf. chapter 1.IV.1.

It should be stressed (once again) that the starting point, and most significant feature of the assessment enquiry will be the personal loss as identified according to the structure outlined in chapters three and four. At the assessment stage, the most important facet of the loss is, again, not the occurrence of the event, but the attendant ‘detriment’; that is to say the content of the implied statement raised by the event about the state or content of the claimant’s personal interests and the concordant seriousness of the inconsistency with the status of that interest as protected by the law.⁴ That detrimental facet, unlike the event occurrence structure behind which it operates, is not a question of binary historical fact, but a functionally distinct non-binary idea. Whether or not the event has occurred and raised an implication requires a yes/no answer. The extent of the negative implication so raised, and thus of the contradiction with the state of the claimant’s interest, requires more.

The two facets are closely interlinked, though, and there must be interplay between them when it comes to properly mapping the severity of particular detriments experienced by the claimant. To some extent, severity mapping occurs at event level. This was considered in chapter four, where a framework was put in place for distinguishing between such ideas as, for example, a sprained and a broken ankle as separate kinds of event for the purposes of loss event identification (ie as a quality of the loss event).⁵ Those could equally, as discussed there, be seen simply as different levels of detriment behind a single event idea of ‘injured leg’. The specific dividing line, the extent to which a detriment is identified as an individual variety of event rather than a detriment grade within a broader event requires judgment in the individual case and, again as discussed in chapter four, will depend on available medical descriptors, practical expediency, a sense of the normatively satisfying labelling of the loss event and the needs of constraining judicial discretion in assessment. What is most important is that there is clarity over what is identified at the

⁴ See chapter 3.II.2. Cf. chapter 5.III-IV.

⁵ Chapter 4.II.

event level and what at the level of detriment, and that the court engages that split framework to allow conceptually meaningful progression through the remedial enquiry. The claimant should see a clear identification of relevant loss events, followed by an evaluation of the extent of associated detriment, followed by the identification of an appropriate sum of money to award to counteract the claims implied by the detrimental event.⁶

A rough guiding line has been placed between describing an injury and the effects of an injury as they impact on the life of the claimant.⁷ The discussion raised in earlier chapters demonstrates clearly that some intuitive importance in the division is already understood currently, with injuries being practically indispensable as encapsulating loss despite allowing for much variation in the extent of the effects imposed on a claimant.⁸ It was shown that the discussion remains somewhat unclear on the exact relevance of each, with some authors proposing to ignore injuries as irrelevant (in part because they are improbably understood in themselves to represent no detriment⁹) whilst others feel that effect merely predominates over injury.¹⁰ One cannot therefore be sure on orthodox analysis whether damages are for the injury or effects alone or both, or in what proportion; this discussion has not carried through into conceptually useful results. Nevertheless, it is significant that the issue is understood to be worth battling over. The new framework resolves that conflict by according clear importance to both at different stages of the remedial enquiry: event identification and detriment assessment. Injury gives us a binary, clear, organising structure around events (the occurrences raising an implied statement about the claimant's interests) to improve labelling, understanding and certainty.

⁶ The progression has also been discussed in chapters 3.I and 5.I.

⁷ Cf. chapter 4.II.

⁸ See especially chapter 1.III.1.

⁹ See A Ogus, 'Damages for Lost Amenities: for a Foot, a Feeling or a function?' (1972) 35 MLR 1. Cf. chapter 1.III.1.

¹⁰ See e.g. Jones, MA et al. (eds), *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014), para 28-56 – effects of injury rather than injury itself (merely) predominate to the extent that a distinction is even made; cf. CT Walton et al (eds), *Charlesworth & Percy on Negligence* (13th edn, Sweet & Maxwell 2014), para 4-71.

Detrimental effects allow us to tailor a remedy within those boundaries to the particular claimant (insofar as the detriment defines the content of the implied statement¹¹).

Chapters three and four thus outlined a focus on medically classified injuries in building the core framework of events. As discussed in chapter three, the result of the personal loss framework is a canon of events (recognised by the courts as detrimental in impliedly raising a negative suggestion about the claimant's interests). Now this assessment basis allows for ranges or brackets of figures to attach for each event in the canon; at the stage of detriment assessment, we can now move forward to effects. The event/detriment division inherent in the personal loss structure gives voice to the division and a role to each part.

It is useful to note here that this 'canon with ranges' result is not the same as a legislative tariff concept. There is no reason why the evolution of the canon and the assessed damages ranges would fall beyond the competence of the courts or operate in anything other than a highly flexible manner and with potential for claimants to plead novel losses, the extent of their detriment, and indeed the case for a general uplift etc. (though an initial legislative intervention might be necessary to force courts to abandon the compensation dogma and begin to understand personal loss in the way proposed in this thesis). As far as compiling a record of the canon is concerned, this would be a very useful exercise and could be achieved from reported decisions as a form of intermittently produced guideline document like the Judicial College's Guidelines.¹² As with those documents, the issue is nevertheless a compilation for practical convenience which in itself would have no bearing on the damages concepts; it would serve to describe the content of a canon developed within the case law. A key difference would be, however, that the events and detriment dichotomy gives a conceptual reason, alongside the practical, why such a

¹¹ Cf. chapter 3.II.2.

¹² Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015); cf. chapter 3.II.3.

guideline would take the form that the Judicial College's publication currently does, organised by a clear medically-driven framework of injuries behind which there is extensive discretion based on effects – injuries are relevant in defining events; behind that possible detriments expand in a non-binary range and rely on a multitude of factors.

b) The seriousness of the detriment

Following this recap and elaboration of the injury and event dichotomy, we now return to consider the specific factors which define the detriment idea within the context of the injury itself. Once again, as regards loss event identification, injury is suitable as proxy for the 'bad' befalling the claimant under the personal loss structure insofar as injury raises and outlines the implied claim made about the claimant's interest (including which interest it relates to, basic severity and duration ideas¹³). The effects of the injury, and their duration and severity, generally fill out the rest of the implied statement, determining precisely in the individual case the scope of the negative insinuation. This contrasts with non-pecuniary loss compensation, where there was supposed compensation of injury and effects in uncertain combination, but it was impossible to describe effects non-arbitrarily and injury was not a proxy for the extent of those effects.¹⁴

It is easy to think of various effects which will be relevant in this regard in relation to any particular harm and effects are of course already used in current practice (the point is simply that current theory and practice cannot coherently explain their interaction with injury). Amongst the most obvious effects of loss events will be the restriction in a claimant's activities brought about by physical or psychological injury. In the Judicial College's Guidelines, for example, the extent of residual movement and degree of

¹³ See chapters 3.II.2, and 4.II-V.

¹⁴ See chapter 2.III.

independence of the claimant are explicitly identified as important factors in determining a precise sum for, inter alia, tetraplegia.¹⁵ Equally, with hand and arm injuries, whether the injured appendage is the dominant one is understandably very important and, similarly, under the heading for brain damage that guide identifies the ‘extent of physical limitations’ as a consideration.¹⁶ The possibility of controlling a condition through medication would be another example whose relevance is clear, and which may of course wax and wane with a pecuniary award for the costs of medication.¹⁷ Similarly (somewhat bridging the last two ideas), the extent to which prosthesis can restore function is highlighted in the context of amputation specifically.¹⁸

As regards experiential losses specifically, it is important to confront the question of evidence – whether such losses are to be assessed ‘subjectively’ or ‘objectively’. As indicated already, this idea has become somewhat confused and misused on the currently dominant approach.¹⁹ Given that the detrimental implication on the personal loss approach is understood from the perspective of a notional observer, the obvious answer would seem to be ‘objectively’: only evidence available to a notional observer can be admitted in understanding the extent of the experiential loss. This can of course, though, include a claimant’s own expressions – whether screams of pain or calmer explanation of her

¹⁵ I.e. paraplegia – see Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 2.a (p 3). For a recent case with extensive discussion of capacity for movement and independence, see e.g. *A v Powys Local Health Board* [2007] EWHC 2996 (QBD) [2]-[14] (Lloyd Jones J).

¹⁶ See e.g. Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 7.E. (Amputation of Arms; p. 46 f) and at 3.A. (p. 5 ff) respectively. For a recent case example of the latter, see e.g. *Stanton v Hunter*, Unreported, 31 March 2017, [39] (Recorder Hatfield QC), highlighting that the brain injury’s symptoms ‘would not inhibit Mr Stanton in the workplace or with domestic activity’. For a case on the dominant arm, see e.g. *Crofts v Murton* [2009] EWHC 3538 (QBD) [7] (HHJ Collender).

¹⁷ Cf. chapter 3.II.3.a generally and see e.g. Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 3.B. (Epilepsy; p. 9 f) for a specific example on manageability. Cf. also e.g. *Pettifer-Weeks v Everest*, Unreported, 12 February 2013 for a simple example of pain being assessed and an award for the means of pain management (there £20 for over-the-counter painkillers). In the absence of a proper breakdown of the losses, the relationship between these painkillers and the varying pain levels is unclear.

¹⁸ See e.g. Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 7.E. (Amputation of Arms; p 46 f). These awards will also fluctuate with pecuniary awards for the prosthetics, especially with the prospect of significant medical progress in prosthetics through robotics etc. (costly but restorative of more function). For an example, see e.g. *Crofts v Murton* [2009] EWHC 3538 (QBD) [7] (HHJ Collender).

¹⁹ Cf. on the misuse of the idea of ‘subjective assessment’, chapters 3.II.3.b, c; 1.III.2.

experience²⁰ – as well as observations of her behaviour or more general factors and understandings, such as the ‘objective reason to fear’ seen in the *Kadir* case.²¹

Less medically clear cut is the issue of the effect of a loss event on such areas as the claimant’s work and social life.²² Within the social life category, there is also of course the particular question of any effect on the sex life of the claimant, which was also noted in chapter two.²³ In this context, it is convenient to look again at the argument raised there that choices about loss (to the extent that they are non-arbitrary²⁴) could be impacted by unarticulated and thus unscrutinised social or cultural factors. It is important here to remember that the loss structures mean that an analysis of the physicality of e.g. a scar (an issue which is not gender-sensitive) and the emotional integrity-effect for the claimant (more variable with the person and so could reflect broader gender ideas) must be separated.²⁵ The personal loss vindication approach cannot in this way directly combat social biases in the assessment sphere – the various persons involved in the litigation and framing the claim will still bring personal bias to the portrayal of detriment²⁶ – but it will be necessary for them to break down and categorise loss more than on the blunt fair value concept. This will be helpful in identifying the limits of discretion and restricting it. Normative discussion is drawn out as the heart of identifying a loss event. The framework also clarifies the interests involved (separating the fact of scarring from how a claimant is

²⁰ See e.g. the evidence used in *Maiden v Rock* [2015] C.L.Y. 1919 (reference made to the patient’s descriptions and objective observations).

²¹ *Kadir v Mistry* [2014] EWCA Civ. 1177, [15] (Laws LJ). Cf. chapter 3.II.3.b.

²² See e.g. Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13th edn, OUP 2015), 9.B. (Facial Disfigurement; p. 80 ff.) for the personal injury context.

²³ See for example *ibid.* at 6.G. (Digestive System; p 31 f). Cf. the discussion at chapter 2.III.3.

²⁴ Cf. chapter 2.III.2 and see below, III.

²⁵ See chapter 3.IV.3. For an example where the court does, to an extent, separate out treatment of these aspects, see e.g. *Giles v Chambers* [2017] EWHC 1661 (QBD), [148] f (HHJ Wood). There, however, the judge does no more than identify the difference, without relating it to identifiable quantum results.

²⁶ Consider also the embarrassment/shame issue noted in chapter 2.III.3. Though the framework here emphasises the importance of the injury-event alongside the minutiae of effects, the detriment part of the analysis will still require discussion of e.g. intimate symptoms for a full understanding of loss. The effect of shame is then not eradicated.

emotionally affected).²⁷ This process of interest-driven categorisation also thus better breaks down and clarifies the aspects of detriment than the undefined ‘senses’ of ‘being worse off’ on the dominant diminution in value theory could:²⁸ for example, a biomechanical sense of the significance of an event will be relevant only in relation to physical integrity, subjective understanding of an event relevant only to emotional integrity. In short, the personal loss vindication concept encourages participants to think more carefully about the losses involved and their nature and normative content. This can only be helpful in understanding and controlling the influence of social and cultural factors, as well as of course revealing normative decisions being made and opening judicial discretion to more scrutiny. The result overall should be more consistent in practice, as well as conceptually better supported.

More generally, public perception has already been seen to have relevance to assessment.²⁹ It should now be clear that it represents an expression of the perspective of the notional observer: general public understandings are the lens through which all of the aspects here are viewed. This is a little different from the sense in which the factor has previously been mentioned, however, insofar as before it was related really to the sense of the fairness or reasonableness of award sums.³⁰ The issue here specifically is the general perception and understanding of the detriment involved. Like many true ‘loss’ issues, this does not emerge clearly from the orthodox framework, whereby a push to move to assessment of a reasonable sum somewhat abandoned the loss itself.³¹ Clearly the seriousness of the detriment in the perspective of the notional observer will turn upon general public perceptions of the same.

²⁷ See also chapter 3.IV.3.

²⁸ See chapters 2.II.1, 2 and 1.II.2.

²⁹ See chapter 5.V.2.d.

³⁰ On which (still important on the new analysis), see below, II.2.

³¹ See in particular chapters 1.II.2, 3 and 2.II.1.

A slight detour might be made here for the age of a claimant. Some authors claim that it is irrelevant to assessment,³² and equally it might look like it has the potential to operate as an abstract, numerical qualifier on the detriment analysed. There are, though, multiple respects in which age can impact on the claimant's suffering, and these can stand in tension. The effects of a physical injury might be more serious with an older claimant insofar as a physically weaker older person is less well-placed to overcome physical detriment. At the same time, however, if an older claimant is physically less capable, their activity is likely anyway to be more reduced (and so less affected). Such considerations are clearly relevant to the detriment involved, but are best dealt with directly in terms of the actual effect on the particular claimant given her capabilities and lifestyle etc. The same applies for youth: where one might argue that a young victim subject to a permanent-type loss event is more seriously affected than an older victim, this is subject to other factors, such as lifestyle or the presence of life-limiting conditions, such that age itself cannot be accounted in isolation. Age is thus not an assessment factor, but it is an important feature of the particular claimant to which the assessment is applied.³³

Finally, we must also reflect on some examples of events not relating to personal injury and their relationship to effects. The most important events in this regard are those relating to the autonomy interest. As suggested, here the courts are prone to deploy very limited awards as conventional sums (in the narrower sense of all but inflexible figures). In doing so, the courts decline to engage with what might otherwise be seen as the full range of effects on the claimant related to the event – where a loss event is recognised in the reproductive autonomy sphere, the court does not apparently wish to mould the award to any concrete difficulties experienced by an unwilling mother (particularly the myriad

³² Robert Stevens, *Torts and Rights* (OUP 2007), 75.

³³ Cf. the Law Commission's conclusion, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 2.25 ff; Allen, D, Hartshorne, JT, and Martin, RM, *Damages in Tort* (Sweet & Maxwell 2000) para 9-077.

organisational life changes necessitated by the arrival of a child needing constant care).³⁴ It has already been suggested here that this relates to the boundary faced in the autonomy field, where other issues impact perfectly legitimately on available choices and further choices beyond the initial question of whether to have a child are made which change the effects.³⁵ The event/detriment duality and the introduction of a non-binary element is not antithetical to more or less immutable conventional figures where a court gives a standard figure with little or no reference to effects experienced. Whether and to what extent non-binary effects are accounted just depends on the particular event in question: where there is less divergence in the detriment which can result within the confines of a particular loss event, or where normatively the court declines to recognise certain aspects or divergences in detriment, this will tend to produce a narrower range of figures in damages at assessment and can ultimately produce a singular standard figure. In other cases which here have been suggested to be autonomy issues, effects are relevant. For physical effects from an unwanted birth, the full effects (much as with bodily integrity-related injury) will be considered.³⁶ Equally, with loss of congenial employment, the courts make awards of anything up to £10,000 depending on the circumstances.³⁷ In the *Willbye* case, emphasis was for instance placed on the difference between two potential effects: being prevented from embarking on the employment and being preventing from continuing in the employment. The former is, understandably, less serious.³⁸

c) Multiple injuries

³⁴ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309 [18] (Lord Nicholls), [8] (Lord Bingham).

³⁵ See chapter 3.II.3.c.

³⁶ *McFarlane v Tayside Health Board* [2000] 2 AC 59, 84 (Lord Steyn), 105 (Lord Clyde).

³⁷ *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15, [11].

³⁸ See *ibid.*

At this point, then, we have the basic structure of assessment of the seriousness of statement and the factors primarily relevant to it. In this and the next subsection, we must turn the analysis to two more particular issues raised in the course of earlier discussions: the correct approach to multiple injuries, and the assessment-outworking of the stepped approach to injuries adopted in chapter four. We begin with the former.

In earlier chapters, discussion has touched on the approach taken to situations where a claimant has suffered multiple injuries or detriments and the then-inevitable question of how this multiplicity is best approached in the assessment of a damages sum.³⁹ Applying the standard framework, the courts have, as noted, taken a ‘bottom-up’ approach of assessing individual injuries and heads before totalling the figures and evaluating in a more holistic way whether the final sum is ‘fair and reasonable’.⁴⁰ The key motivator behind any such position is a desire to avoid any (real or suspected) ‘double-accounting’⁴¹ and thus we first require an understanding of whether, where and to what extent the vindication of event losses approach might produce ‘double-accounting’. First and foremost, it is clear that the framework cannot produce any overlap between injuries which reference different underlying interests. No argument can be accepted that the inconsistency with emotional integrity represented by a pain award during the recovery period of a broken leg ‘overlaps’ with recovery for the bodily interest inconsistency of the broken leg injury ipse. Where orthodoxy attempts to boil the entire question down to identical-kind value sums or payment for alternatives, this was arguable; where there is recognition that the award counteracts implications about two separate interests, this is not. Indeed, part of the vindication will lie in the very process of identifying each particular event loss.

Next it is necessary to ask in respect of the same interests whether e.g. two particular injuries relating to bodily integrity might have overlapping negative implications as

³⁹ See chapters 1.IV.2 and 3.IV.2.

⁴⁰ Very clearly confirmed by the Court of Appeal in *Sadler v Filipiak* [2011] EWCA Civ 1728.

⁴¹ See *Fletcher v Autocar Transporters* [1968] 2 QB 322, 336 f (Lord Denning MR); cf. *Lim Poh Choo v Camden & Islington Area Health Authority* [1979] QB 196 (CA), 218 (Lord Denning MR).

regards the claimant's personal interests. That does seem plausible, particularly where the injuries are very closely related (at the borderline as to whether a medical expert might described them as two facets of one injury or two closely related injuries, especially, for example). This is plausible as an overlap idea within the assessment process: if I raise the same implication twice, that might reinforce it somewhat, but the overall implication will not be twice as serious as if I made the implication once. The overall implication for assessing the detriment may then sensibly be approached once both implications individually have been identified and assessed. That is not, however, the same as the standard approach confirmed by the Court of Appeal. In *Sadler*, the focus of the more general reasonableness evaluation is the total sum of non-pecuniary loss damages being awarded; the singular figure arrived at.⁴² That goes too far – the extent of 'overlap' possible across the personal losses is limited to examples of the same implication being raised (and so as just noted certainly only applies with losses engaging the same interests). That will rarely be true of the entire personal loss damages sum and instead the losses involved would need to be grouped together by these interest-implication categories in order that the different implications of each group can be assessed.

This is no real difficulty. The personal loss framework proposed anyway requires that loss events be identified and understood by reference to the interest implications raised and the process of considering the limited number of clusters grouped by the interest implication is no great deal more burdensome practically, or prone to lead to untenable attempts at precise calculation, than the current approach. Again, though, it does facilitate the court stressing the normative bedrock of the remedy – the vital, underlying personal interests.

In short then, it is appropriate to attempt some limited 'broad-view' questioning of awards, but not in terms of heaping everything together as a singular figure and seeing if

⁴² *Sadler v Filipiak* [2011] EWCA Civ 1728, [34] (Pitchford LJ).

this in some way seems reasonable. The focus must remain on the implied claims raised about the claimant's particular interests. To give a practical example, imagine a sprained ankle and a broken toe are suffered and the claimant also experiences pain and distress. The ankle and toe figures may be put together and subjected to a question of whether overall the sum for bodily integrity losses represents the sum of the seriousness of the inconsistency with the bodily integrity interest. The pain and distress losses can also be regarded together for their overall implication about emotional integrity. However, the bodily and emotional integrity figures should not be mixed. The change from current practice would here be obvious.

d) Deterioration

Within the context of the personal loss as identified from the framework in previous chapters, there is also one final issue which requires particular treatment as a matter of the seriousness of detriment: injuries which are made worse and deteriorations in a claimant's condition, discussed in chapter four.⁴³ There it was outlined that, as a matter of event identification, viewing injuries as being capable of 'stacking' upon each other allowed for an account of the claimant's pre-existing condition despite an identification of loss by comparison to other states being inappropriate. To account for the case of an entirely new, serious form of an injury, that structure did however require the introduction of a transitional-duration form of the injury event. Thus, for example, where a finger is crushed in an industrial accident, producing as its end result a severe finger injury, the claimant would plead the occurrence of minor, moderate and severe forms, with the former two pleaded in transitional form and the latter in (let us suppose) permanent form. Associated with this is an assessment issue of how those transitional duration injuries come to be

⁴³ See chapter 4.IV-V.

incorporated into the assessment process; how that identification works itself through the rest of the remedial process.

It is perfectly clear that a transitional duration form of an injury would, all else being equal, represent a less serious denial of the claimant's interest than a short or medium term form of the same. Exactly how much less would be a matter for the court's discretion, but a much smaller damages sum would be the obvious end product. As a result, the claimant with the entirely new severe finger injury used as an example above would receive sums for injuries at each severity grade, someone with an equivalent injury where only the severe part was new would receive only a sum for that. The former will then only, it would seem, receive a very small amount more than the latter. This seems problematic. Equally, a claimant who ends up with the same severe injury as the result of a lengthy period of deterioration, spanning each of the severity grades, might receive a larger overall figure than the victim who suffers the finger injury in one traumatic incident (because her recovery for the less severe grades would not be limited to the transitional duration). That too might be thought problematic.

The solution to those difficulties lies in two ideas. Firstly, it might actually be a perfectly justified normative decision to place greater emphasis on the more severe forms of injury in this way. Especially in the present climate, with concerns over minor-injury fraud (especially with whiplash⁴⁴) and a supposed compensation culture,⁴⁵ and where a large portion of the costs accruing from the tort system result from minor claims (which society may not wish to validate through treating those injuries as serious enough to receive damages awards large enough for a claimant to bother claiming), that is a choice which could be made. Secondly, the multiple injuries argument made above can serve to ameliorate or eradicate this discrepancy insofar as it is thought problematic. It is perfectly

⁴⁴ See e.g. Ministry of Justice, *Reforming the Soft Tissue Injury ('whiplash') Claims Process. A consultation on arrangements concerning personal injury claims in England and Wales* (2016).

⁴⁵ See generally e.g. Richard Mullender, 'Negligence law and blame culture: a critical response to a possible problem' (2006) 22 PN 2.

clear that different severity grades of the same injury are sufficiently close to raise fundamentally the same sort of implication about the same interest of the claimant. For that reason, they can be considered together in terms of the implication they collectively raise about that interest. A court might then decide, for instance, that the traumatic, single-incident victim must receive a higher award because the negative implication raised by the whole is, so-to-say, greater than the sum of its parts. Alternatively, the slow degeneration victim might be thought not to have had his interest subject to as great a detrimental implication as the ‘sum of the parts’ would suggest.

Thus, the requirement to appreciate the overall detrimental implication to a particular personal interest of the claimant complements the event divisions outlined earlier in this thesis. The overall effect is to allow for a nuanced appreciation of the detriment to the claimant, but still structured around a clear framework of binary events. The seriousness of the detriment is understood through this structure. The decisions made, though inherently discretionary, are consequently organised, clearer, and more transparent.

2. Damages sums and their seriousness

With that, discussion of the seriousness of the detriment can end and we can move to consider (what on the personal loss framework is now clearly) the *separate* but *parallel* question of the seriousness of the counterstatement made by particular sums when awarded as damages. In that regard, there is firstly nothing in either the vindication concept or the personal loss identification process outlined which would deny the significance of previous awards. The identified event and detriment ascertained as described must be used to isolate appropriate comparator cases to guide the assessment of what sums are considered appropriately large for what severity of loss. All of the other factors discussed above will feature as giving precise content to the size of awards made previously, just as and

precisely because they give precise content to the notion of the seriousness of the injury in the previous case for what the particular sum was given. The loss in the case gives meaning to any particular sum chosen in terms of seriousness.

In short, little would change practically in respect of the damages sum choice with the introduction of the personal loss framework proposed in place of the non-pecuniary loss compensation orthodoxy. Conceptually, the previous and present sums must simply be understood in terms of the seriousness statement involved in paying them (rather than their value) and as needing to parallel a better-explicated loss idea. Where there are no previous awards, however, as in the case of an entirely new form of loss for which no comparator is available (and of course in theory with the first awards made), the personal loss approach demonstrates enough conceptual integrity to better explain the choice of a particular sum than the compensation orthodoxy (where the system can operate acceptably in practice once certain ‘values’ are conventionally accepted [though the theory behind them remains a mess] but can give no reason at all for the selection of an initial value beyond a far too vague sense that a certain value range just feels appropriate⁴⁶). Likewise the value of money is operative with the minor but important conceptual difference that value is important in relation to the associated seriousness of the payment, with greater value tied to greater seriousness. This applies both to understanding the previous awards made, and any sum contemplated in the present case. Unlike the dominant theory and for this reason there is no false impression of precision created by the use made of monetary sums: it is clear that the exercise is a holistic idea of representing seriousness, rather than a calculation between values.⁴⁷

⁴⁶ Cf. chapter 2.II.2. Cf. also e.g. Zavos’ theory, which requires a first sum from legislative input to them order everything relatively by reference to that – Harry Zavos, ‘Monetary Damages for Non-monetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Non-economic Damages’ (2009-2010) 43 Loy LA L Rev 193, 250 ff.

⁴⁷ Cf. chapter 2.II.2.

As noted in previous chapters, current practice uses the Retail Price Index (RPI) in accounting the value of money for these purposes.⁴⁸ Nothing in the personal loss vindication framework is opposed to that choice; any metric which as a matter of economics can claim to demonstrate or chart the change in money's value over a given period will be serviceable as long as there is also consistent application of it. The retail index might, however, might be thought particularly apt insofar as it demonstrates what can be done in day-to-day terms with particular sums of money (as contrasted with more abstract ideas like employment indices or GDP). What the sum of money awarded is capable of providing is relevant to the seriousness of the statement its award makes in the eyes of the notional observer, even though what the particular claimant will or could do with the money is entirely irrelevant. Use of a consumer price index might be preferable to this extent (representing better the value of money more in terms with the average personal injury litigant and thus the average non-pecuniary loss claimant in negligence), but the distinction is minor.

Finally, it should also be noted that the issues relating to the general perception of award sums and the societal impact of making such awards as discussed in chapter five are relevant at this point.⁴⁹ Such ideas give expression to the context in which the notional objective observer stands and from which perspective that observer views an awarded set to make a counterstatement. This places them straightforwardly alongside previous awards made and the value of money.

III. Selection and the formulation of claims

⁴⁸ See chapters 1.IV.1.a.ii and 5.V.1, 2.b.

⁴⁹ See chapter 5.V.2.d, e.

The structure of parallel questions of seriousness should now be clear; statement and counterstatement are set against one another and matched. We have established the functional place of deleterious effects in the system, considered some prominent examples of them, and equally discussed the parallel issues of value and convention for the seriousness of particular damages sums. We now turn to issues relating to the practical formulation of a claim for personal loss damages where a question remains: can we sensibly and non-arbitrarily select and plead the effects which define detriment.⁵⁰ This section will consider the arbitrariness of selecting particular effects, the importance of structuring effects around the relevant detrimental events, and the place of personal loss damages as regards 'general damages'.

In chapter two (and then variously since), criticism has been made of the use of effects as the basis for the remedy because it is, *inter alia*, impossible to describe effects fully or for particular effects to have any claim to be more representative than others in describing the loss. This, it has been argued, leads to fundamental arbitrariness in the descriptions of non-pecuniary loss ultimately given (or else at best biased by unrecognised social and other imperatives).⁵¹ The same arguments do not hold here when considering vindication for personal loss, however, and the key to this difference lies at a very general level in the vindicatory aim, the interplay of detrimental implication and counterstatement, and the fact that we are concerned with a clearer perspective in that of the notional observer. These ideas result in a clear sense that there must be an objective, normative evaluation of the seriousness of the detriment/appropriate seriousness of counterstatement sum from the particular perspective of the notional observer and in respect of the time period between the implied statement (raised at the injury event) and counterstatement (made with the damages judgment). This aids the identification of relevant effects.

⁵⁰ In addition to the issue of bias by social or cultural factors discussed just above.

⁵¹ See chapter 2.III.2, 3.

Firstly, the time leading up to the making of a damages award can claim to be considered determinative, unlike with non-pecuniary loss compensation. Compensation is about putting the claimant into the position she would otherwise have been in (which applies to her position stretching years into the future as much as it does her current position). Vindication in the sense used here is about counteracting a negative implication raised and existing through until the point it is counteracted. The statement, which alone represents the existence of the inconsistency with the claimant's interests (the shadow cast over it which needs dispelling), has no existence after the counteraction, such that it is legitimate to focus on the detriment between event and award and (to this extent) ignore the future. Consequently, no difficulty is raised of the kind seen with compensation, where effects/detriments stretched into the future, were thus more uncertain, and yet had equal claim with those presently dominant in the claimant's thinking to represent the loss.⁵²

Secondly, this shift in focus from the claimant's state to the implied statement about her interests gives parameters for understanding the level of detriment when the notional observer looks at the issue. We ask how detrimental the notional observer finds those effects in that period, viewed from the standpoint of that period. For this reason, it is perfectly acceptable to choose key impacts on the claimant as being representative of the total detriment over others; there is no reason they all or their full extent have equal claim to be representative and so included. This contrasts strongly with the situation under a compensation of non-pecuniary loss analysis. That diminution in value theory entailed that any and all effects should equally be corrected and there is no way to choose a temporal point at which it is more legitimate to assess the severity or relative importance of any particular effect. Increasing uncertainty looking into the future and the lack of a temporal

⁵² See chapter 2.III.3.

end point prevent any really accurate appraisal of the detriments.⁵³ For the new theory, however, if during the period between the event and the award it was of most significance that the claimant could not do X, X can be seen as the most significant effect, regardless of whether some years in the future Y will seem more important to her; if during that period X was a really very serious detriment, then it can be seen as that serious, regardless of whether some years further into the future its seriousness trails off. Personal loss is, namely, all past loss at the point of award. There is therefore no selection and informational imbalance problems in respect of past and future elements of the sort contemplated in chapter two.⁵⁴ In this way, it can be seen that those factors which led to the conclusion that choosing effects to frame or assess a claim under the orthodox approach was either a secretly normative or else wildly arbitrary process do not carry the same weight on the new approach. The firmer, binary confines of the (injury-focused) event identification process restrict the assessment enquiry in such a way that this arbitrariness is ameliorated.

At this point, however, it should be noted that the strong focus on the time between loss event and award might be thought to start to generate an inconsistency with the account of the duration of an injury and continuing event idea in chapter four. Insofar as this time constraint (the time between event and award) seems to provide an end-stop for assessment, why, for example, would it matter whether the prognosis for a leg injury is medium- or long-term, when we could describe all injuries simply as lasting a certain percentage of the period between event and award? If the period between event and award were very short, both medium- and long-term injuries would qualify as lasting the entire duration of the relevant period. There is in reality no inconsistency, however, insofar as any duration decision relates not to a statement of the length of time the injury has lasted or

⁵³ Cf. Donal Nolan, 'Rights, Damage and Loss' (2017) 37 OJLS 255, 263: really one requires at least a whole-life perspective.

⁵⁴ See chapters 2.II.2 and 2.IV.3.

will last, but an estimate of how long that sort of injury lasts as a description of the quality of the injury. This idea was emphasised in chapter four as the key to understanding how a duration account did not introduce a quantitative identification of the loss event, and it reappears now.⁵⁵

Beyond the selection of effects for presentation of the relevant detriment, a brief note must also be made on pleading and the formulation of a statement of claim. Insofar as this relates to the loss events, this has been dealt with in earlier chapters. To recap, a claimant will plead from previously recognised events, with the potential to argue for recognition of a novel example on the basis of its normative relevance and its being a definable binary event which can fit into the analysis structure.⁵⁶ This may, as with other loss events clearly already recognised, be a singular sort of event, or have grades of severity and duration built in at the event description stage.⁵⁷ Once the analysis moves on to the detriment question, the issue is much more open-textured. As noted above, the focus is on the impacts on the claimant resulting from the event, and it is legitimate to guide our focus on them by reference to how important or serious they appear during the period up to award. The aim is to demonstrate the extent of the effect on the claimant as a proxy for the level of inconsistency with the claimant's interest implied by the loss event. Given that at this level the claim is operating within already quite closely defined parameters (the binary injury events), there is no need in terms of certainty or otherwise to limit the content which may be pleaded here to particular categories or kinds (hence no such criteria have been discussed above). The issues will be familiar enough from current practice and will no doubt overwhelmingly take the form of tasks or activities necessitated or prevented by the injury, or adaptations in conduct involved.

⁵⁵ See chapter 4.III.

⁵⁶ Chapter 3.II.3.

⁵⁷ Chapter 4.II-IV.

It must be clearly stressed, however, that effects must be considered in terms of the interest-related loss events on which they follow (and viewed in those terms). To turn back to an example to demonstrate this division of effects, consider a broken leg which prevents a claimant from playing her favourite sport and produces additional difficulties (in a non-financial sense) in getting around. The claimant also experiences pain and embarrassment at her condition which impact on her desire to engage actively in her social life. The effects of the bodily integrity-related loss event in the breaking of the leg would include *inter alia* the difficulties in getting around, not being able to play sport, and any impact on social life attributable to the physical movement problems. The pain and embarrassment would represent emotional integrity losses, and the effects would include *inter alia* any reduction in activity or disruption to social or work life which resulted from the pain or embarrassment. The detrimental effects must be related to the specific injury events which produce them (and thus to the relevant personal interests). It is not enough to make a general, overarching statement that the claimant cannot e.g. participate in her social life; we must stipulate if that is related to her emotional integrity, physical integrity, or a (what) combination of both.

Finally, a further issue worth noting in respect of the formulation and organisation of claims is that the distinction currently used between special and general damages (in the sense of the distinction between items of recovery that are and are not (respectively) precisely calculable should disappear on the personal loss framework. Although there is still no precise calculation of a sum to be awarded as a vindictory response to personal losses (the sums are still conventional), the fundamental change in the conceptual foundation of the loss idea would suggest that inclusion in a category with imprecisely calculable future pecuniary loss is disingenuous. The latter are imprecisely calculable in the sense that they are pecuniary, value losses for which insufficient data is available for precise calculation; a calculation of value is still performed, it is simply an inexact one.

The former, by contrast, are now rendered as value-less losses for which all of the relevant assessment data is at hand (insofar as the vindication approach focus the assessment of detriment on the time period up to award as discussed above in this section); the process is not conducted by calculation so much as assignment of appropriate figures by convention, made in circumstances of (for these purposes) complete knowledge and as 'precise' as it can be. The urge to mix and potentially confuse value calculation and valueless statement should be resisted.

IV. Awards

With a framework for pleading and assessing a damages sum for detrimental event losses in place, it is necessary to move forward to the award of those sums itself and question the form in which it is to be made.

1. Lump sums and provisional awards

It should already be relatively clear that there would be nothing antithetical to the personal loss framework proposed in making the award in either a lump sum or periodical payment form. Especially given that the vindictory bedrock is not concerned with the actual effects on the claimant or defendant, rather with the need to convey a sufficiently serious message to the notional observer), the specifics of the payment form and its timing are essentially a secondary concern: the seriousness of the statement is not affected by payment (which instead mostly concerns policy and the practicalities of securing the payment or its effect on the claimant). A choice between the two to achieve a greater or lesser positive impact for the claimant can still be made, but it should be clear that the concern is secondary to the primary function of vindication, which is ambivalent as between the options. The

vindictory purpose is achieved with the award, the imposition of the obligation to pay the sum of money set at a severity level appropriate to vindicate in the eyes of an objective, notional observer.

Equally, the potential for a provisional damages award is unproblematic and easily incorporated into the personal loss framework with only one small proviso.⁵⁸ If an event might occur in the future, after the award (and so counterstatement) is made, then that event will at the point of its occurrence produce a negative implication not encompassed by the award (because the award relates to the implications of the particular events by reference to which it is assessed). In such circumstances, it would be perfectly appropriate to return to the court for an ‘addendum’, as it were. It is important in this respect, though, that the contemplated future harm is one which can be so qualified as a recognised loss event, not simply an effect relevant as to detriment. The system must focus, that is, on the occurrence of a new loss, not simply on there being a change in how past loss would have been assessed – in the latter case, the change is irrelevant, because the counterstatement serves to dispel the negative implication; once dispelled by that counterstatement assessed at the appropriate time, the implication cannot revive (and become more serious in light of the new effect). By contrast, a new loss event would itself raise an implication. This is bolstered by the practical concern that a claimant cannot continually return to court for reassessment. By contrast, the value diminution orthodoxy can only give that latter, pragmatic reason for limiting the availability of a return to court. Conceptually, any change which results in better appreciation of the value impact on the claimant of the underlying wrong would seem to warrant a change in assessment for the orthodox theory.

2. Interest

⁵⁸ Indeed, provisional damages were contemplated as part of the solution for subsequent injury situations in chapter 4.III.

As far as interest on the award is concerned,⁵⁹ the vindication idea does not focus on value-effect on the claimant, and so at first glance there would seem to be no sense in awarding her the same value of money she would have had if the money had been received earlier (in conflict then with the statutory requirement to make an interest award in personal injury cases⁶⁰). Interest cannot serve to maintain the value which should be awarded to the claimant if the sum given is not primarily value-related and is correct as to seriousness at the point of assessment and award.⁶¹ Moreover, the conceptual framework is premised on making a purely prospective counterstatement which does not try to eradicate or undo past events; it simply removes the sting from the implications they raise. For that reason, it might seem strange to suggest that the claimant has been ‘kept out of’ the award since the accrual of the action or its service on the defendant. On the vindication of personal loss approach, giving the value of money now does not make the vindictory statement happen earlier, nor does it reproduce the effect of it happening earlier.

Detriment could conceivably, though, be thought to be greater insofar as a negative implication exists for longer without contradictory statement. A notional observer might expect an untrue and detrimental implication to be counterstated immediately (as a victim would be entitled to expect) and delay might be thought to entrench the negative implication, giving it credibility. This effect could be represented by an interest sum. If this is the case, then interest should be awarded from the point at which the particular implication arises (and at which an immediate counterstatement should be forthcoming), which is to say when the detrimental event occurs, and through until the judgment date (at which the counterstatement can be considered made). Current practice must be thought to

⁵⁹ For an outline of current practice on awarding interest for non-pecuniary losses, see chapter 1.IV.2.

⁶⁰ Senior Courts Act 1981 s. 35A (1), (2); County Courts Act 1994, s. 69 (1), (2). Cf. chapter 1.IV.2.

⁶¹ Cf. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 7.3 – set at current prices and so inflation proof.

be wrongly conceived insofar as interest is awarded only from service of an action.⁶² This was seen to be thought of as representing a compromise given the impossibility (under the orthodox analysis) of separating past and future elements of non-pecuniary loss damages, such that interest had also to be awarded inappropriately to the latter.⁶³ Under the personal loss framework here, however, all personal loss is past loss insofar as it is represented by events and the implications they raise up until the counterstatement is made through a damages award. In awarding interest, therefore, there is no unfortunate accrual of interest by a future loss award which would necessitate compromising the start date. Equally, arguments against interest which root in calculation problems and the purely conventional nature of the sums involved have no force here.⁶⁴ This is because the proposal here makes interest itself corrective of a core facet of the loss, and part of the primary award, rather than a means by which to maintain the value of a loss award. To this extent, including an interest award does not mix precise pecuniary calculation (ordinary, value-maintaining function of interest) with a conventional figure; the figure for interest must itself be conventional. Arguments about the level of investment return and whether 2% is a true approximation of value returns are therefore a red herring.⁶⁵ The size of the interest rate (and whether it ought be simple or compound) are conventional and must parallel the perceived entrenchment of the negative implication involved in the losses; to that extent, the issue boils down to the value of interest (only) as determining seriousness of the counterstatement thereby made.⁶⁶

⁶² *Jefford v Gee* [1970] 2 QB 130. Cf. chapter 1.IV.2.

⁶³ Harvey McGregor (ed), *McGregor on Damages* (19th edn, Sweet & Maxwell 2014), para 18-095. Cf. chapter 1.IV.2.

⁶⁴ See e.g. Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 7.3.

⁶⁵ *Ibid*, paras 7.5 f. Cf. Andrew Tettenborn (ed), *The Law of Damages* (LexisNexis 2003), para 10.47. Cf. chapter 1.IV.2.

⁶⁶ The Law Commission's argument that simple or compound interest makes little or no real value difference on a rate as low as 2% therefore still holds good as an argument in regards to choosing one or the other – see Law Commission, *Pre-Judgment Interest on Debts and Damages* (2004) Law Com No 287, para 7.10.

We should pause briefly to emphasise the difference between this idea of the implication raised by an event as ‘entrenching’ whilst it persists and the basic question of the duration of loss events. Duration as discussed in chapter four and as related to the detriment assessment discussed above relates to the quality of the loss and thereby to the extent of the negative implication raised by the prospect of its existing through the predicted duration or having existed through the actual duration (if resolved at the point of award).⁶⁷ Nothing in that accounts for the actual length of the period for which the negative implication is allowed to exist, only the extent of its inconsistency with the claimant’s protected personal interests. It may be useful to consider a concrete example once again. Suppose that D negligently injures C in a road traffic accident. C suffers a very serious fracture of her femur and a minor sprained wrist; the latter entirely resolves within 2 months, the former is expected to resolve within roughly a year. Suppose further that damages fall to be assessed after six months. There is a detrimental implication about both C’s bodily and emotional integrity raised – D effectively tells the notional observer that C had no protected interest inconsistent with D imposing a sprain which was minor and of a kind which lasts two months and a broken femur which is serious and of a kind lasting about a year. Those implications are given more credibility by the fact that they (are allowed to) simmer without counterstatement for six months. This increases the detriment but is not a facet of the duration-quality of the injuries themselves – it relates to the six months between the beginning of the loss events (point of injury) and the making of the counterstatement (the award of damages); not to a year for the one year-lasting sort of femur injury or two months for the two month-lasting sort of sprain injury.

In short, interest practice must be adjusted – interest should accrue to all personal losses from the point of each event as identified. This is not a procedural add-on to

⁶⁷ See chapter 4.III.

maintain the value of the primary award, but represents a corrective for an additional substantive facet of the personal loss.

3. Appellate interference

Another important feature of damages practice in relation to non-pecuniary loss compensation is the lack of appellate interference in awards made under than orthodox framework; we saw earlier that judges in the higher courts have only been willing to interfere in the discretionary judgments of lower level courts where the award is understood to be manifestly wrong or it is clear that a judge proceeded on the basis of an error of principle.⁶⁸ Particularly important reasons for that lay in the fundamental proposition that there is no demonstrably correct answer to the question of a fair and reasonable value to assign for the award for loss and that appellate courts do not have access to the full evidence – especially witnesses on the issue of injuries. The vindication of personal loss framework would present room for an increase in the appellate role with respect to control over the legal question of recognition of particular events.

It will be recalled that insofar as the loss concept involves the authoritative recognition of particular events as loss events (in the relevant sense of detrimental by virtue of raising an interest-inconsistent statement), the framework produces a legal question which does not appear on the more open-ended value diminution approach. With the latter, the court for the most part simply exercises discretion to produce a value award, tied inherently to the particular case facts and only of precedential value to that extent; this occurs under general headings of pain and suffering and loss of amenity, with a few satellite exceptions of particular losses recognised through the higher courts.⁶⁹ A personal loss concept

⁶⁸ See generally chapter 1.IV.3.

⁶⁹ See chapter 1.III.2, 3.

recognises as a more general normative question whether particular events are concretely recognisable as losses (which has precedential value far beyond the immediate case), as well as providing a sum as an award representing a serious counterstatement (which is inherently tied to the case facts, highly discretionary, and of accordingly limited precedential value). In respect of that first question, the arguments as to why a court should not interfere on appeal do not apply – the question can be thought to have as much of a ‘correct’ answer as any policy choice made by the law, and a court’s analysis of the issue does not relate intimately to the particular facts or evidence of the case so as to hinder sensible appellate discussion. This should already in fact be clear from current practice, where the cases which do occasionally arise in this field in the higher courts generally relate to particular forms of loss being recognised – such as loss of congenial employment,⁷⁰ loss of reproductive autonomy,⁷¹ the now defunct loss of expectation of life,⁷² and indeed the more general idea of non-experiential amenity loss.⁷³

Such a development should be welcomed as an opportunity to impose more appellate control over the remedial process, leaving as little as possible to a broad and open discretion. As maintained throughout this thesis, it is important that the vital normative discussions underlying loss-related decisions are drawn out into the open for proper review and scrutiny. Widening the possibility of appellate control is part of that. Equally, of course, the approach taken to personal loss, which places emphasis on a careful outlining of the loss events, and for each of which the detriment involved, opens up the possibility of at least some further scrutiny of the discretionary sum-setting decision. The more information that is required in terms of outlining the loss, the less a trial judge can hide

⁷⁰ Which has at least twice reached the Court of Appeal this century – *Willbye v Gibbons* [2003] EWCA Civ 372; [2004] PIQR P15; *Chase International Express v McRae* [2003] EWCA Civ 505; [2004] PIQR P21.

⁷¹ A creature of the House of Lords – *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309.

⁷² Identified in the Court of Appeal in *Flint v Lovell* [1935] 1 KB 354; endorsed equally in the House of Lords later – *Rose v Ford* [1937] AC 826.

⁷³ Demonstrated by the unconscious claimant cases, which have multiple times reached the House of Lords; e.g. *West v Shephard* [1964] AC 326; *Lim Poh Choo v Camden & Islington Area Health Authority* [1980] AC 174.

behind the shadowy figure of discretion and the inherently flexible nature of the specific sums chosen. Appellate interference would and should increase under the personal loss framework.

V. Conclusion

This chapter has outlined that the assessment of a sum in damages as a response to personal losses in negligence is focused around establishing the seriousness of the detriment to the claimant as a proxy for the extent of the inconsistency raised against the claimant's interests. Each injury event from the identification stage is evaluated for its seriousness as the initial step. Within those approximate ranges of severity, more detail, more tailoring to the particular claimant, is added having regard to the particular negative effects attendant on those injuries which still relate to the interest involved (and so relate to the inconsistency with the interest). The approach taken to multiple injuries allows for this sense of seriousness to be nuanced in respect of the overall implication of a multitude of harms and equally with rapid or with slow deteriorations in a claimant's condition. This question of seriousness of the detriment runs parallel to the seriousness of the counterstatement made by any particular award sum, judged against past decisions, the value of money and public perceptions. Statement and counterstatement in this way form a bridge between value-less personal loss and monetary value.

In practice, the result is, in terms of the operation of the process, similar in many respects to what is recognisably current practice. However, the loss and assessment concepts now marry practice and theory together coherently, where before there was inconsistency and tension. The assessment discussion here picked up from the loss identification framework proposed, and moved to try and understand how and what variety of assessment process could pick up that baton and deliver it over the damages sum finish

line. On the traditional framework's conceptual underpinning, the tariff-based system rested on little more than clumsy fictions about value replacement and estimation. There are, though, a number of practical improvements suggested – it is not only theory which is altered by the new framework. The presentation of the loss and damages analysis in a judgment will need to change, with normative discussion brought out and losses understood by reference to the interest to which they relate; this could bring more scrutiny at the appellate level. Not only that but interest awards on personal losses would need to be regularised – the new theory gives their award purpose and meaning in remedying the specific detriment resulted from a negative implication existing for a longer period without remedy.

The structure presented in these final two chapters has given an overall structure across, and functional independence to, the relevant facets of assessment enquiry. Injury and effects are intuitively both of consequence; this framework accords them importance, and does so in a way which is clear and facilitates proper loss identification at the same time as nuanced quantification. It gives reasons for the organisational structure of the tariffs practitioners think in and, again, which have hitherto had intuitive appeal but no solid conceptual footing.

Conclusion

In summary, this analysis has sought to reconsider the orthodoxy currently ultra-dominant in England and Wales in respect of the recovery of damages for non-financial losses in the tort of negligence and to provide a more conceptually coherent framework for understanding such recovery. This was made necessary by the tendency to underappreciate the importance of non-financial losses and a pressing need to provide conceptual justification for damages recovery. It has involved the institution of a more rigorous ordering for the remedial enquiry and a departure from the most fundamental tenets of the current approach.

Chapter one outlined the dominant orthodoxy, highlighting its key features in the (attempted) treatment of non-pecuniary losses behind an analogy to pecuniary ones: the primary commitment was to the notion of compensation, which left loss to be understood as a value differential between two states; this compensation ideal was understood in terms of an aim of replacing the ‘value’ thus lost. The resultant compensatory damages sum was seen to be set as a form of estimate (because value is admitted to be an imprecise or incalculable idea here), in the form of a generally fair and reasonable sum, of that value, judged primarily by reference to prior awards, the circumstances of the case and judicial discretion. The extent to which this evaluation turns on the effects of an injury or else the injury itself was seen to be unclear, however, and an underlying split between objective and subjective forms of loss proved to be controversial. The assessment of the damages award in practice was seen to involve very broad discretion and factors which, like the invaluable nature of the interests involved, conflicted with the demands of the compensation theory. In short, the dominant theory was seen to be assessment-focused and to produce tensions between theory and practice.

In chapter two, that standard framework was criticised on the basis that it failed to provide a clear structure for the remedial analysis, conflating the identification of loss with the assessment of a damages sum and presupposing an impossible aim of compensation. Compensation is rather an operator to assess the damages award and cannot, as the orthodoxy entails, be assumed in advance of an independent definition of loss as the bad to be thus remedied. Insufficient guidance is therefore provided by the traditional model in the identification of loss, failing to account for what seem to be intuitively important boundaries and distinctions and relying on un- or under-articulated ideas of what loss or ‘being factually worse off’ means to carry the conceptual burden. In particular, such issues as the recovery of unconscious claimants and the interrelation of recovery for injuries and the effects of them are important in that respect. Perhaps most critically, and already the subject of recognition that there are deep-seated conceptual flaws with the value compensation model, the nature of non-financial losses are not compatible in themselves with expression in terms of monetary or numerical value. Moreover, the apparent relevance of *all* of the effects of injury was seen to lead to fundamental arbitrariness and/or unrecognised normative decision-making in outlining losses in a claim. The overall effect of the failure to recognise these critical features of non-financial losses and to address the conceptual problems they have wrought is to diminish the recognition given to non-financial loss recovery and thus to distort a sense of the critical normative importance of the interests thereby represented. It is not appropriate to continue to allow the significance of the most fundamental of personal interests, more important than any monetary concerns, to remain ill-expressed and ill-appreciated.

In response to this, the remainder of the analysis sought to reconsider non-financial losses from a new perspective. In order to account for the key features of such harms, which had led to tensions in the orthodox analysis, this began by focusing on the loss concept itself without any preconceptions as to the aim or function of an award to be made

in response. A proper progression was thus imposed, from identification of the ‘bad’, to ascertainment of the relevant operator to be applied, to ascertainment of an appropriate damages sum by application of that operator to that ‘bad’ in the circumstances of the case.

Chapter three began this reconceptualisation work by attempting to refocus our understanding of loss away from a problematic system of counterfactual comparison of value to a value-less, event-based identification system. Under this approach, a personal loss is understood in terms of the (binary) occurrence of an event which is detrimental insofar as it raises a (non-binary) implied statement about the victim’s protected personal interests inconsistent with the status and extent of those interests under the law. ‘Event’ and ‘detriment’ represent two limbs to personal loss, with the event allowing clear identification and labelling of personal losses, and detriment allowing for nuanced, non-binary assessment thereafter. The question of whether any particular event is detrimental in the eyes of a notional observer demands and draws out the critical normative discussions about the recognition of particular losses and forces a categorisation by reference to the particular and crucial personal interest involved. In this way, a positive and explicit structural outline for the concept of a personal loss was created as a competitor to the ill-articulated and obfuscated idea of loss which can be drawn from current understandings and is fundamentally inconsistent with the definitive features of non-financial harms.

This foundational structure was then demonstrated to be capable of explaining a number of the core and, ultimately, more borderline recoveries, especially loss of reproductive autonomy and loss of congenial employment, which were seen to be related and explicable in terms of the claimant’s autonomy interest. That process of outlining example losses saw repeated demonstration of the advantages of the approach as a whole in drawing out the normative argumentation necessary to establish and understand a loss and bringing consistency and conceptual clarity to the field. A uniform approach to identifying personal loss could be found, independent of any (other) element of the liability

or remedial enquiries. In short, by interrogating beyond ‘made worse off in some sense’, and declining to leap forward to placing a value figure on the invaluable, the proposed loss approach encourages engagement with the nature and normative content of items of loss, allowing for better categorisations and the chance to reconcile recoveries which otherwise seem anomalous or isolated; the system as a whole can be regularised. This combination of a focus on content and the presence of a more robust conceptual support structure is critical in defending recovery for such losses against attack by its detractors.

Chapter four refined and nuanced certain key aspects of this binary event analysis. It was demonstrated that personal losses could be identified in events, even where this identification needs to indicate to some extent a notion of the severity and duration of an injury and to account for cases where the wrongdoing accelerated or made worse a pre-existing injury or condition. For a normatively appropriate, accurate and satisfying labelling of loss, these otherwise non-binary or comparison-based factors needed to be and were accounted. By imposing a system of categorising events based on loose, practice-driven categories of severity and duration (as qualities of the events), by understanding lesser forms of injury to be superseded by more severe forms, and by appropriate deployment of the causation requirement, all of these issues could be resolved. The binary event foundation can remain intact. Furthermore, chapter four approached the difficult question of death as a candidate for loss; it was here demonstrated that, unlike the comparative state-based accounts more commonly used, the event-based personal loss concept could be applied to the case of death to arrive at an answer whether death can or should count as a recoverable loss. The result of that application was seen to be the institution of a policy-based priority as between the interest-extinction which accompanies death and the interest disparagement involved in a loss event. The policy arguments which seem important in deciding whether to allow recovery for death itself as a loss were thereby given conceptual room to operate, where this supporting framework is again

lacking on the traditional non-pecuniary loss approach. This concluded discussion of the identification stage of the remedial process, centred on personal loss' first limb – an event.

Chapter five moved forward on the basis of this understanding of loss to consider what the relevant 'operator' for conversion of the identified loss into a damages sum for awarding to the claimant could and should be. The wide-ranging suitability of a concept of vindication was demonstrated, focused on Varuhas' 'specialised' concept of the function as demonstrating and reinforcing the importance of personal interests within the law's hierarchy. This function is able to engage with personal losses as a form of counterstatement to the negative implication involved in the loss. In contrast with that, it was shown that a number of other key candidate concepts for the operation are relatively inadequate as regards accounting for pivotal and intuitively correct features of damages assessment. In particular, the dominant value-replacement concept of compensation is unable to engage with a value-less, qualitative concept of loss of the sort proposed here in personal loss event form and the idea of solatium was seen to apply only to losses as experienced and simply to have too little substantive content to guide any assessment process. Punishment, meanwhile, would require the use of a number of assessment factors considered inappropriate. In short, vindication must be the answer.

Chapter six, finally, proceeded to apply the vindication concept preferred in chapter five to the concrete question of the assessment of a damages figure for personal losses in the tort of negligence to demonstrate the operation of the concept in more practical terms. It was here shown that the assessment process functions by a parallel examination of the seriousness of the loss implication and the seriousness of the counterstatement made by any particular sum of money as an award. This parallel accounting can explain the tendency of some assessment factors to draw focus away from the impact on the claimant – they relate to the seriousness of the sum awarded. In this way, the division between value-less, personal loss and valued, monetary damages is highlighted and respected, but

overcome without falsely imposing value on the loss itself. In addition to these conceptual improvements, the framework was also shown to be capable of regularising elements of damages practice – in particular by giving meaning to the award of interest on personal loss damages (as itself a vindictory element of the substantive remedy).

In short, the thesis has outlined a new framework which is conceptually superior to compensation for non-pecuniary loss and which works in harmony with damages practice. The conclusions reached have implications reaching beyond the immediate, necessarily limited context of recovery for personal loss in the tort of negligence, but are as yet confined to this tort. It has been intended as a defence of recovery for detriments which are non-monetary where this has come under repeated criticism and threat in light of the deep-rooted conceptual flaws in the understandings maintained to date. It is not correct to say that damages awards here do not achieve any purpose; they may not compensate, but they vindicate. It is equally not possible to say that the harms involved are unimportant, undeserving of redress, or that the expense of the process is unwarranted; the interests involved are fundamental ones, and where compensation for non-pecuniary loss subordinates them to pecuniary interests, whitewashing over the resultant conceptual problems, the loss framework proposed here demonstrates their important, independent status at every turn.

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